Supreme Court, U.S.
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No. 06-

IN THE SUPREME COURT OF THE UNITED STATES

LOUISE ELIZABETH HURST,
Petitioner

v.

TEXAS DEPARTMENT OF ASSISTIVE
AND REHABILITATIVE SERVICES, *ET AL*
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Texas waived its Eleventh Amendment immunity to suit in federal court by accepting federal funding to support its vocational Rehabilitation Program under Title I of the Rehabilitation Act, 29 U.S.C. § 701 - §796 which conditions States' receipt of federal funding on compliance with all conditions set out in the Program and specifically provides for judicial review of final decisions of "designated State units."

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioner:

Louise Elizabeth Hurst

Respondents:

Texas Department of Assistive and Rehabilitative Services ("DARS") (formerly known as the Texas Rehabilitation Commission);

Terry Murphy, Commissioner of the Texas Department of Assistive and Rehabilitative Services

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The court of appeals' decision is reported at 482 F.3d 809 (5th Cir. 2007) and reprinted in Appendix A (hereinafter "App."). The district court's decision is reported at 392 F. Supp.2d 794 (W.D. Tex. 2005) and reprinted in App. B. The Report and Recommendation of the United States Magistrate Judge (filed May 20, 2005) is reprinted in App. C.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on March 26, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). 28 U.S.C. 2403(a) may apply. The courts below did not certify to the Attorney General that fact that the constitutionality of an Act of Congress was drawn into question, pursuant to 28 U.S.C. 2403(a). Jurisdiction in the district court was asserted based on 28 U.S.C. §1331 (federal question), as well as the Rehabilitation Act, as amended, 29 U.S.C. §722. In addition, Petitioner relied upon 28 U.S.C. §2201, authorizing the court to grant declaratory relief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the Spending Clause, Art. 1, §8, cl. 1 of the United States Constitution, and Title I of the Rehabilitation Act, 29 U.S.C. § 701 - §796 are reprinted in App. D.

STATEMENT OF THE CASE

This Petition addresses the Fifth Circuit's ruling that the judicial review provision contained in the Vocational Rehabilitation Program set out in Title I of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 - §796, violates the

Eleventh Amendment of the U.S. Constitution. Other courts of appeals have reached the merits of these judicial review cases, thus de facto finding a waiver of immunity. The Fifth Circuit in this case recognized that the judicial review clause specifically applies to state units. Nevertheless, the appellate court incorrectly concluded that Section 102 of the Rehabilitation Act [29 U.S.C. §722] "does not contain the necessary 'clear statement' required under the *Dole* test for finding a waiver of Eleventh Amendment immunity under federal Spending Clause legislation." *Hurst v. DARS*, 482 F.3d 809, 814 (5th Cir. 2007); *South Dakota v. Dole,* 483 U.S. 203 (1987).

This raises an important question of federal law that has not been, but should be, settled by this Court. The federal Vocational Rehabilitation Program set out in Title I of the Rehabilitation Act (1) conditions receipt of federal funding on compliance with all conditions set out in the Program, 29 U.S.C. §721(b); (2) requires an opportunity for judicial review of adverse determinations in federal court, 29 U.S.C. §722 (c)(5)(J); and (3) specifically provides that only a "designated State unit" is a potential defendant in a suit for judicial review brought by an individual, 29 U.S.C. §722(c). If such statutory language does not satisfy the unambiguous intent requirement of *Dole*, then, it would appear that only statutes containing rote references to state sovereign immunity or the Eleventh Amendment would manifest the requisite unambiguity. Although this statute does not contain that rote language, its terms and structure nonetheless would leave no doubt in the mind of a responsible State official that to receive this federal funding "designated State units" are required to submit to federal court jurisdiction to review their final decisions.

A. District Court Ruling. Petitioner, Louise Elizabeth Hurst, filed this civil action in the Western District of Texas on November 21, 2003, to review the denial of vocational rehabilitation services by the Texas Rehabilitation Commission (now the Texas Department of Assistive and Rehabilitative Services). The Defendants in the district court filed a motion to dismiss based on Eleventh Amendment immunity. Ms. Hurst responded that the State had specifically waived immunity to suit for judicial review under 29 U.S.C. §722 (c)(5)(J)(i) when it accepted federal funds provided through Title I of the Rehabilitation Act of 1973. The Magistrate Judge found that Ms. Hurst's claim under §722(c)(5)(J)(i) could go forward and recommended that DARS motion to dismiss be denied. DARS filed objections to the Magistrate's recommendation.

In a *de novo* review, the district court rejected the report and recommendation of the Magistrate in relevant part and granted DARS' motion to dismiss by an order entered on September 22, 2005. App. B.

Ms. Hurst appealed.

B. Court of Appeals Decision. On March 26, 2007, the Fifth Circuit affirmed the district court's dismissal of Ms. Hurst's suit for judicial review. *Hurst v. DARS*, 482 F.3d 809, 814 (5th Cir. 2007) (App. A). The court held that 29 U.S.C. §722 did not contain the necessary 'clear statement' that the State of Texas waived immunity if it accepted federal funds through the Vocational Rehabilitation Program and that Texas had not otherwise waived its immunity from suit. *Id.* The court of appeals recognized that, unlike the statute at issue in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which provided a federal court remedy for 'any recipient of federal assistance or federal provider of such assistance", the Rehabilitation Act "specifically makes acts by a 'designated State unit' subject to judicial review." *Id.* at 812-13. The court of appeals, nonetheless, held that the judicial review language at issue in this case is "indistinguishable" from the language before the Court in *Atascadero*. *Id.* The court of appeals also distinguished this case from Fifth Circuit and Seventh Circuit cases that held that the structure of a statute could satisfy the "clear statement" requirement and provide "non-verbal" waiver of Eleventh Amendment immunity, reasoning that the statute in those cases involved federal preemption issues and that Title I of the Rehabilitation Act does not. *Id.* at 813-14.

REASONS FOR GRANTING THE PETITION

The judicial review provision at issue here provides:

> Any party aggrieved by a final decision . . . may bring a civil action for review of such decision. The action may be brought in any state court of competent jurisdiction *or in a district court of the United States of competent jurisdiction* without regard to the amount in controversy. (emphasis added.)

29 U.S.C. §722 (c)(5)(J)(i). Unlike similar judicial review provisions previously reviewed by this Court, this statute explicitly states that only decisions of a "designated State unit" are subject to this review. *See* 29 U.S.C. §722.

The Fifth Circuit's decision eviscerates the clear Congressional intent underlying the federal judicial review provisions of the Vocational Rehabilitation Program, set out in Title I of the Rehabilitation Act of 1973, as amended. The decision also is inconsistent with decisions of other United States courts of appeals that have reached the merits of judicial review cases. Moreover, it creates confusion concerning the Vocational Rehabilitation Program and the standard for determining waiver of Eleventh Amendment immunity through Spending Clause legislation. Supreme Court Rule 10(a).

This case also presents important questions about federal courts' jurisdiction to enforce provisions of federal law and state agencies' compliance with the statutory requirements of a federal Spending Clause program. These questions have not been resolved by this Court and should be. Supreme Court Rule 10(c).

The Fifth Circuit's decision in this case may further complicate, and, thus, cause confusion in, Eleventh Amendment jurisprudence. The Fifth Circuit, like the Seventh Circuit, found waiver of Eleventh Amendment immunity in the Federal Telecommunications Act of 1996, though it lacked explicit references to waiver and Eleventh Amendment immunity. *See AT&T Comm. v. Bellsouth Telecom.*, 238 F.3d 636, 646 - 647 (5th Cir. 2001), and *MCI Telecom. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 341 - 344 (7th Cir. 2000). In both the *AT&T* case and the *MCI* case the courts reasoned "Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity." *AT&T,* 238 F.3d at 645, *MCI,* 222 F.3d at 339. In both cases the appellate courts analyzed the structure of the statute at issue and held that it unambiguously conditioned receipt of funds on waiver of Eleventh Amendment immunity. *AT&T,* 238 F.3d at 646-47, *MCI,* 222 F.3d at 341.

In the case at bar, the Fifth Circuit distinguished its *AT&T* decision because the Telecommunications Act of 1996 involved federal preemption and Title I of the Rehabilitation Act does not. *Hurst v. DARS*, 482 F.3d at 813–14. Yet establishing one analysis for Spending Clause legislation that involves federal preemption and another for Spending Clause legislation that does not involve preemption further complicates an already complicated jurisprudence.[1]

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[1] Further confusing immunity jurisprudence is the fact that other circuit

This Court has not previously addressed this question because a statute that contains similar judicial review language to that found in Title I of the Rehabilitation Act has not previously reached this Court. The Court should resolve this important question of federal law and sustain Congress' intent that federal courts review States' compliance with the requirements of the federal Vocational Rehabilitation Program.

I. ELEVENTH AMENDMENT IMMUNITY IS NOT ABSOLUTE

The Eleventh Amendment to the U. S. Constitution, unless waived, bars suits against a state or one of its agencies or a state official in his official capacity when the real party in interest is the State:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

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courts of appeals are reaching the merits of judicial review cases pursuant to 29 U.S.C. §722, thus implicitly finding a waiver of immunity. *See Diamond v. Michigan*, 431 F.3d 262 (6th Cir. 2005), *Reaves v. Missouri Dept. of Elem. and Second. Educ.*, 422 F.3d 675 (8th Cir. 2005) (both deciding the merits of suits for judicial review pursuant to 29 U.S.C. §722); *see also Carrigan v. New York State Educ. Dept.*, 2007 U.S. Dist. LEXIS 42481 (N.D.N.Y. June 12, 2007). These differing approaches among the lower courts could create inconsistency among the circuits.

However, Eleventh Amendment immunity is not absolute. This Court has recognized that a state may waive its immunity by consenting to suit. *College Saving Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). One way a state may waive its Eleventh Amendment immunity is by accepting federal funds, provided through a statute Congress has enacted through the Spending Clause of the U.S. Constitution[2] that unambiguously requires waiver of the Eleventh Amendment immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (stating "A state may effectuate a waiver of its constitutional immunity by . . . waiving its immunity to suit in the context of a particular federal program . . ."). That is precisely what the Vocational Rehabilitation Program does.

II. WAIVER OF ELEVENTH AMENDMENT IMMUNITY BY ACCEPTING FEDERAL FUNDS

In *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court described the circumstances in which waiver of Eleventh Amendment immunity by acceptance of federal funds will be found. First, the federal expenditures must benefit the general welfare; second, the conditions imposed on the recipients must be unambiguous; third, the conditions must be reasonably related to the purpose of the expenditures; and fourth, no condition may violate any independent constitutional prohibition. *Id.* at 207-08. The *Dole* case also included a fifth requirement, that the condition may not be coercive. *Id.* Only the second requirement, the unambiguous conditions requirement, is in dispute in this case. *Hurst v. DARS*, 482

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[2] The Spending Clause provides that "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." Art. I, §8, cl. 1 of the U.S. Constitution.

F.3d 809, 811 (5th Cir. 2007).

This Court has held that a state waives its immunity by voluntarily participating in a federal spending program when a statute manifests a clear intent to condition participation in the program on a State's consent to waive Eleventh Amendment immunity. *Dole,* 483 U.S 203; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). *See also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (the opinion "does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment.") (Scalia, J. concurring).

Applying these principles to the federal Vocational Rehabilitation Program reveals that the judicial review provision in Title I of the Rehabilitation Act, are unambiguous and that to operate its rehabilitation program with federal funds Texas must have waived any claims to immunity. The terms and structure of the Rehabilitation Act leave no doubt that Congress intended states that received funds under the Act to waive Eleventh Amendment immunity to judicial review of final administrative decisions in vocational rehabilitation programs. In fact, the Respondents/Defendants obviously recognized this clarity because after the Act was amended in 1998 to add the judicial review provision at issue here, the agency amended its own regulations to provide for judicial review in federal court. *See* 24 TEX. REG. 1606 (Mar. 5, 1999) and 24 TEX. REG. 3111 (April 16, 1999). Significantly, the amendments to the state regulations were made "to conform the rules to the 1998 amendments to the Rehabilitation Act of 1973". *Id.*

Thus, the State of Texas received substantial funds in exchange for compliance with certain unambiguous federal requirements, including federal court review of the actions of state entities. The conditions placed on receipt of the funds were clear and unambiguous to any reasonable person. There is no other rational interpretation. The rigid linguistic standards set by the Fifth Circuit in this case impose an unacceptable burden on the expression of legislative intent.

III. THE REHABILITATION ACT'S STRUCTURE ITSELF ESTABLISHES UNAMBIGUOUS INTENT TO WAIVE STATE'S IMMUNITY FROM SUIT

Title I of the Rehabilitation Act describes in detail the requirements of state vocational rehabilitation plans. 29 U.S.C. §721(a). It provides that any state plans that do not fulfill the specified conditions must be disapproved. 29 U.S.C. §721(b). And it details the procedures of mediation and administrative review that state vocational rehabilitation must have. 29 U.S.C. §722 (c). It provides that "[a]ny party aggrieved by a final decision [of a hearing officer or state reviewing official, as the case may be] described in subparagraph (I), may bring a civil action for review of such decision . . . in a district court of the United States of competent jurisdiction." 29 U.S.C. §722(c)(5)(J). Most significantly, the only entities within the class of potential defendants in a federal suit for judicial review under Title I are "designated State unit[s]." 29 U.S.C. §722(c).

Importantly, 29 U.S.C. §703 authorized advanced funding so states could establish and fund vocational rehabilitation programs. *See* 29 U.S.C. §703. *See* also 29 U.S.C. §720 (declaration of policy and authorization of appropriations), 29 U.S.C. §721 (detailed requirements for state plans to receive funding), and 29 U.S.C. §§730, 731 (allotments and payments to states). Title I of the Rehabilitation Act also established the Rehabilitation Services Administration to carry out the purposes of Title I, *see* 29 U.S.C. §702, including provision of consultative services, technical assistance, and training to programs authorized under Title I, *see* 29 U.S.C. §709, and an annual evaluation of vocational programs' effectiveness, *see* 29 U.S.C. §711. Thus, Title I of the Rehabilitation Act clearly conditions federal funding of state vocational rehabilitation programs on compliance with the requirements of 29 U.S.C. §722, including the requirement of judicial review of final decisions of "designated State unit[s]" as required by 29 U.S.C. §722(c).

Thus, Section 722 read in the context of the structure of Title I as a whole makes it unambiguously clear that state entities that accept federal funds under Title I are required to waive their Eleventh Amendment immunity and allow federal court jurisdiction for judicial review of their final decisions.

Thus, the case at bar does not present the situation that this Court faced in *Atascadero*. In *Atascadero*, this Court considered whether Title II of the Rehabilitation Act as it existed at that time satisfied the "clear statement" rule. The Court noted that the court of appeals decision it was reviewing (and would reverse) based its view on the fact that the Act provided remedies, procedures, and rights against "any recipient of Federal assistance" while the implementing regulations expressly defined the class of recipients to include the States." *Atascadero*, 473 U.S. 235, 237 (1985). Thus, at that time a federal agency, not Congress, had decided that states should be included within the class of defendants who could be sued under Section 504 of the Rehabilitation Act and state defendants were among myriad other potential defendants. In contrast, in the case at bar, the Act itself provides that the state entities receiving funds under the Act are the **only** defendants in a suit for judicial review. Thus, Title I of the Rehabilitation Act provides a specific authorization of federal jurisdiction for a judicial review lawsuit against a State entity, not the general authorization for suit in federal court rejected in *Atascadero*. *See id.* at 246

This characteristic is also the crucial difference between Title I of the Rehabilitation Act, as amended, and the Education of the Handicapped Act (EHA) reviewed by this Court in *Dellmuth v. Muth*, 491 U.S. 223 (1989). In *Dellmuth*, this Court ruled that the structure of the EHA merely "lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference." *Id.* at 232. In stark contrast here, Congress expressly provided for judicial review of the actions of *state entities* as a condition for receiving federal funding. Thus, although the judicial review provision of the EHA at issue in *Dellmuth* was strikingly similar to 29 U.S.C. §722(c)(5)(J)(i), the differences in the structure of the two Acts lead to opposite conclusions: While the EHA only "len[t] force to [an] inference" that States were intended defendants, Title I of the Rehabilitation Act makes State entities the only intended defendants in a suit for judicial review.

This crucial difference is why the EHA judicial review provision was constitutionally ambiguous while the judicial review provision of Title I of the Rehabilitation Act is unambiguous. Although the issue in *Dellmuth* was whether the EHA abrogated Eleventh Amendment immunity and the case at bar concerns Spending Clause legislation, which require distinct analyses, both analyses require a statute to be unambiguous. In that respect they are similar. *See Atascadero*, 483 U.S. 203, 247 (after holding that statute lacks sufficient clarity to abrogate Eleventh Amendment immunity, Court holds it "likewise" fails to manifest clear intent to require waiver under the Spending Clause).

In short, this case raises important questions of federal law that should be resolved by this Court.

CONCLUSION

Petitioner respectfully asks this Court to grant the petition for a writ of certiorari to resolve the important questions of federal law presented by this petition.

Respectfully submitted,

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APPENDIX A

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
DATED AND FILED MARCH 26, 2007

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 05-51656

LOUISE ELIZABETH HURST

Plaintiff - Appellant

VERSUS

TEXAS DEPARTMENT OF ASSISTIVE AND
REHABILITATIVE SERVICES,
also known as DARS; TERRY MURPHY,
Commissioner of DARS

Defendants – Appellees

Appeal from the United States District Court
For the Western District of Texas

Before DAVIS and STEWART, Circuit Judges, and CRONE[*], District Judge.

---

[*] District Judge of the Eastern District of Texas, sitting by designation.

W. EUGENE DAVIS, Circuit Judge:

This case presents the question of whether the State of Texas waived its Eleventh Amendment immunity to suit in federal court by accepting federal funding to support its Vocational Rehabilitation Program under Title I of the Rehabilitation Act, 29 U.S.C. § 701-796. The district court agreed with the State of Texas that 29 U.S.C. § 722(c)(5)(J)(i) did not represent a clear-statement of congressional intent to condition the State's receipt of federal funds upon the State's waiver of Eleventh Amendment immunity. We affirm.

I.

BACKGROUND.

Appellant, Louise Elizabeth Hurst (Hurst), filed this suit in district court to review the denial of medical treatment by the Texas Rehabilitation Commission (now the Texas Department of Assistive and Rehabilitative Services, also referred to DARS). Appellant exhausted all available remedies which culminated in an administrative hearing before an administrative law judge who affirmed the denial of medical services and the denial of a motion for reconsideration of that decision.

The defendants in the district court responded to Hurst's suit with a motion to dismiss, based on Eleventh Amendment immunity of the State of Texas to suit in federal court. The magistrate judge to whom the motion was referred found that Congress in §722(c)(5)(J)(i) clearly conditioned the State's receipt of federal funds under this program upon the State's waiver of Eleventh Amendment immunity. DARS filed objections to the magistrate judge's recommendation. The district court declined to accept the magistrate judge's recommendation and dismissed the case without prejudice on grounds that Congress had not clearly declared its intent to condition the State's receipt of federal funds upon the State's waiver of Eleventh Amendment immunity. Hurst challenges the district court's ruling in this appeal.

II.

WAIVER OF ELEVENTH AMENDMENT IMMUNITY BY A STATE.

The Eleventh Amendment to the United States Constitution states "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. 11. There are two well-established exceptions to Eleventh Amendment immunity. First, Congress can abrogate Eleventh Amendment immunity without a state's consent when acting under its authority under the enforcement provisions of § 5 of the Fourteenth Amendment. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). Second, a state may waive its immunity and consent to suit in federal court. Id. One way a state may waive its Eleventh Amendment immunity is by accepting federal funds disbursed pursuant to Congress's Article I, § 8 spending power that were properly conditioned on the state forgoing its sovereign immunity. Id., n.1; *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000). Hurst argues that the state of Texas has waived its immunity by accepting federal funding of its Vocational Rehabilitation Program, under Title I of the Rehabilitation Act. 29 U.S.C. § 701-796.

A state's receipt of federal funds does not automatically constitute a waiver of its Eleventh Amendment immunity. The Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987) described the limited circumstances in which a waiver will be recognized:

> (1) Federal expenditures must benefit the general welfare;
>
> (2) The conditions imposed on the recipients must be unambiguous;
>
> (3) The conditions must be reasonably related to the purpose of the expenditure; and
>
> (4) No condition may violate any independent constitutional prohibition.

Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 278 (5th Cir. 2005), citing *Dole*, 483 U.S. at 207-08. Dole also recognizes a fifth requirement that the condition may not be coercive. Id. DARS concedes that the Rehabilitation Act satisfies four of the five elements of this test. The parties dispute whether the second requirement, of an unambiguous statement, has been met.

A state waives its immunity by voluntarily participating in federal spending programs only when Congress includes a clear statement of intent to condition participation in the programs on a State's consent to waive its constitutional immunity. *Atascadero,* 473 U.S. at 247. "By insisting that congress speak with a clear voice, we enable the States to exercise their choice [to waive sovereign immunity] knowingly." *Pace*, 403 F.3d at 279 (quoting *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17). In seeking to determine whether the language of a condition is sufficiently clear, courts must view the statute "from the perspective of a state official who is engaged in the process of deciding whether the state should accept [federal] funds and the obligations that go with those funds," asking "whether . . . a state official would clearly understand [the nature of the condition]." *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, ___ U.S. ___, 126 S.Ct. 2455, 2459 (2006). "In a Spending Clause case, the key is not [the intention of Congress] but what the States are clearly told regarding the conditions that go along with the acceptance of . . . funds." Id. at 2463. A statute must furnish "clear notice regarding the liability at issue" to which the state has allegedly waived its immunity. Id. at 2459.

Hurst argues that § 102 of the Rehabilitation Act codified at 29 U.S.C. § 722(c)(5)(J)(i) provides a clear-statement of intent to require a state to waive its Eleventh Amendment immunity in order to receive federal funds based on the underlined language in this subsection of § 722:

> (i) in general. Any party aggrieved by a final decision described in subparagraph (I), may bring a civil action for review of such decision. The action may be brought in any state court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy. (Emphasis added.)

29 U.S.C. § 722(c)(5)(J)(i)(underlining added). We have found no federal circuit court decisions addressing the specific issue presented in this case, i.e. whether the above quoted provision satisfies the clear statement rule.[1] Fortunately, the United

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[1] Several district courts have addressed this question. *See Hurst v. Tex. Dep't of Assistive & Rehab. Serv.*, 392 F. Supp. 2d 794, 801-02 (W.D. Tex. 2005) (pending the instant appeal); *White v. Vocational Rehab.*, No. Civ. 04-

States Supreme Court has addressed this issue in regard to a different section of the Rehabilitation Act with language very similar to that used in § 722.

> In *Atascadero* the statute in question provided that: the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] [including the right to sue in federal court to enforce obligations imposed under the statute] shall be available to any person aggrieved by any act or failure to act by any recipient of federal assistance or federal provider of such assistance under section 504 [29 U.S.C. § 794] of this title.

29 U.S.C. § 794a. In finding a lack of federal jurisdiction under the Eleventh Amendment, the Court reasoned that "a general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero*, 473 U.S. at 246. The court also considered whether the above statute could support a conclusion that the State consented to suit in federal court by accepting funds under § 504 of the Rehabilitation Act. The Court rejected the reliance by the Ninth Circuit Court of Appeals on the fact that the states were the express intended recipients of federal assistance and that the statute authorized suits by designated plaintiffs against a general class of

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842-HU, 2004 WL 3049760, at *2 (D. Or. Dec. 20, 2004); *adopted by* No. CV-04-842-HU, 2005 WL 771395 (D. Or. Apr. 5, 2005), *aff'd on other grounds by* No. 05-35439, 2006 WL 2633720 (9th Cir. Sept. 14, 2006); *Richards v. Alibozek*, No. CV010510286S, 2002 WL 1815918, at *5-6 (Conn. Super. Ct. June 26, 2002); *see also Diamond v. Michigan*, 431 F.3d 262 (6th Cir. 2005); *Reaves v. Mo. Dep't of Elem. & Secondary Educ.*, 422 F.3d 675 (8th Cir. 2005).

defendants which literally included States or state instrumentalities as consent by the State to be sued in federal court. Id. at 247. Rather it concluded that the statute "[fell] far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." Id.[2] Hurst's argument is indistinguishable from the argument rejected in Atascadero and the statutory language at issue in this case is similarly indistinguishable from the language at issue in Atascadero.

Hurst seeks to distinguish Atascadero on the basis that the statute at issue there provided a federal court remedy against "any recipient of federal assistance or federal provider of such assistance" without expressly extending such liability to States. Hurst points out that by contrast the statutory framework in this case specifically makes acts by a "designated State unit" subject to judicial review in state or federal courts. 29 U.S.C. § 722(c). Hurst is correct that Congress's lack of specificity concerning the entity or entities it wished to subject to liability influenced the Court's decision in Atascadero. But

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[2] In response to *Atascadero*, Congress passed additional legislation including a clear-statement of its intent to condition the receipt of federal funds upon a State's waiver of sovereign immunity for liability incurred under § 504 of the Rehabilitation Act. The statute now provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7.

Congress's abrogation of state immunity was also an issue in that case and the lack of specificity was discussed in its consideration of the abrogation issue, not the waiver issue. The court stated,

> The statute thus provides remedies for violations of § 504 by "any recipient of Federal assistance." There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipient of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.

Atascadero, 473 U.S. at 245-46.

Hurst also relies on *AT&T Communications v. Bellsouth Telecomm. Inc.*, 238 F.3d 636 (5th Cir. 2001), as supporting her assertion that the language of § 722(c)(5)(J)(i) makes a clear statement of the state's consent to suit. Ms. Hurst's reliance on *AT&T* is misplaced. Although *AT&T* involves voluntary waiver by a State of its rights under the Eleventh Amendment, the nature of the Telecommunications Act interpreted in that case makes its clearly distinguishable from the Rehabilitation Act at issue in this case. In 1996 Congress exercised its constitutional authority to create a national regulatory scheme for telecommunications. In that act, the Federal Telecommunications Act of 1996, Congress preempted State and local regulation of telecommunications. 47 U.S.C. § 151 *et. seq*. The States were permitted to play a limited role in the regulatory process and only as dictated by the FCC. State public service commissions had the option of approving or rejecting any interconnection agreement adopted by carriers. If the state chose to approve or reject such an agreement and made a determination under the act, a party aggrieved by the determination could challenge it in an action in federal district court under the following provision:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirement of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). Significantly, Congress gave exclusive jurisdiction to federal courts to review the commission's orders and appeals to state courts were prohibited. The Court stated "Congress may still obtain a non-verbal waiver of a state's Eleventh Amendment immunity, if the waiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on waiver of immunity." *AT&T*, 238 F.3d at 645, citing *MCI Telcoms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 339 (7th Cir. 2000). Non-verbal waiver was found principally on the basis of the state's acceptance of an offer from Congress to act in an area otherwise preempted by federal regulation, which state action was unambiguously subject to review only in a federal court. The pervasiveness of the federal preemption and the exclusivity of the federal appeal make clear that participation by the state in the federal regulatory scheme entailed waiver of immunity from suit in federal court.[3]

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[3] In the *MCI* case, which the *AT&T* court relied upon, the Court stated, in finding a voluntary waiver of Eleventh Amendment immunity for the Telecommunications Act:

> Although the language of the statute does not contain the express waiver language that the commissions seek, the structure of the pertinent section of the statute, notably 47 U.S.C. § 252 (Supp. II 1996), nevertheless makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place.
>
> . . .
>
> In short, Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court. We therefore conclude that the 1996 Telecommunications Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory scheme entails a waiver of immunity from suit in federal court. Accord *MCI Telecomms. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 938 (10th Cir.2000) (concluding that § 252 puts states on notice that Congress intends to subject them to suit in federal court if they act under § 252).

MCI Telecoms. Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 341-42 (7th Cir. 2000).

This case contains neither of those elements. The Rehabilitation Act is not a comprehensive regulatory scheme preempting state action. States are free to offer similar services with or without participation in the federal program. In addition, Section 722(c)(5)(J)(i), which Hurst relies on, specifically allows suits in state courts. In other words, unlike *AT&T*, this is not a case where "the state has been put on notice clearly and unambiguously by the federal statute that the state's particular conduct or transaction will subject it to federal court suits brought by individuals." *AT&T*, 238 F.3d at 644.

Ms. Hurst contends finally that DARS voluntarily waived its Eleventh Amendment immunity through the adoption of rules for judicial review. She points out that prior to the enactment of the Rehabilitation Act amendments of 1998 the TRC rules only allowed judicial review in Texas state district courts in Travis County, Texas. However, after Congress enacted the 1998 amendments to Title I of the Rehabilitation Act the TRC adopted amendments to § 104.8 to provide for judicial review in federal court as well as in state court. Hurst argues that DARS predecessor clearly conducted itself as if it "knew" that it was required to allow federal judicial review of its final decisions. We rejected a similar "knowing acceptance of federal funds" argument in Pace:

> Knowledge by the state equates with the clarity of the statement of the requirement in the federal law, not a subjective knowledge standard.

Pace, 403 F.3d at 285.

III.

CONCLUSION

Section 102 of the Rehabilitation Act does not contain the necessary "clear-statement" requiring a waiver of Eleventh Amendment immunity if the State of Texas accepts federal funds for this program. Neither has Texas voluntarily waived its Eleventh Amendment immunity for this program. We, therefore, affirm the judgment of the district court dismissing this suit.

AFFIRMED.

APPENDIX B

ORDER OF

THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS,

DEL RIO DIVISION

DATED AND FILED
SEPTEMBER 22, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

LOUISE ELIZABETH	§	
HURST,	§	
Plaintiff	§	
	§	
	§	
	§	**CIVIL NO.**
v.	§	**DR-03-CA-104-AML**
	§	
	§	
TEXAS DEP'T OF	§	
ASSISTIVE & REHAB.	§	
SERV., et al	§	
Defendants.	§	

ORDER

Pending before the Court in the above-styled cause is the United States Magistrate Judge's Report and Recommendation that the Defendants' First Amended Motion to Dismiss, filed under FED. R. CIV. P. 12(b)(1) and 12(b)(6), be denied. The Defendants timely filed a written objection to the United States Magistrate Judge's recommendation. Due to the Defendants' objection, and in accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b), this Court must now conduct a *de novo* review of the Defendants' motion.

I. BACKGROUND

Louise Elizabeth Hurst ("Hurst") was diagnosed with cervical spine damage in June 2002. She sought assistance for her physical circumstances from the Texas Department of Assistive and Rehabilitative Services ("Department"), which was formerly known as the Texas Rehabilitation Commission. The Department determined that Hurst was eligible for vocational rehabilitation services and referred her to a neurologist for a consultation.

The neurologist recommended immediate surgery to fuse Hurst's cervical vertebrae. The Department also approved, at Hurst's request, a second opinion consultation with another doctor. That doctor also recommended immediate surgery to fuse the vertebrae. He also referred Hurst to an infectious disease specialist to determine the nature and extent of an infection in Hurst's neck before setting a date for surgery. In March 2003, the Department approved Hurst's consultation with the infectious disease specialist, who then requested tests to determine the nature of Hurst's infection.

Around March 17, 2003, Hurst's caseworker indicated by telephone that the Department had approved the tests requested by the infectious disease specialist and the surgery to fuse her vertebrae. Later that month, however, Hurst's caseworker told her in person that the Department would not approve the tests or surgery because the Department did not cover exploratory surgery. In a letter dated March 31, 2003, the Department confirmed its decision to Hurst and informed her that it would not approve any further medical treatment.

Hurst filed a timely appeal of the Department's decision and proceeded to exhaust all available administrative remedies. Hurst brought an action in this Court, pursuant to 29 U.S.C. § 794a(a)(2), 29 U.S.C. § 722(c)(5)(J)(i), and 28 U.S.C. § 1331 for judicial review of the Department's decision. The Department responded by filing a motion to dismiss stating among other things that: 1) Hurst had failed to state a claim under § 504 of the Rehabilitation Act of 1973 (codified in 29 U.S.C. § 794); and, 2) Texas had not waived its Eleventh Amendment sovereign immunity to submit itself to this Court's jurisdiction under § 722(c)(5)(J)(i). Hurst responded that she had stated a claim for relief under § 794a(a)(2) and that the Department and Texas had waived Eleventh Amendment immunity under ***797** § 722(c)(5)(J)(i) when they accepted federal funds.

The United States Magistrate Judge found that Hurst had failed to state a claim under § 794a(a)(2)[1], but that Hurst could still obtain relief under § 722(c)(5)(J)(i).[2] The Department argues that the Magistrate Judge should have dismissed Hurst's claims that were brought under § 794a(a)(2) for failure to claim any form of discrimination. The Department further argues that her § 722(c)(5)(J)(i) claim for judicial review is barred by Texas's claim of Eleventh Amendment immunity. The Court is in agreement with the Magistrate Judge's finding that Hurst has failed to state a claim pursuant to § 794a(a)(2). As a result, any claim Hurst brought under § 794a(a)(2) is dismissed. The Court must now determine whether Hurst may obtain relief under § 722(c)(5)(J)(i).

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[1] The Magistrate Judge found that § 794a(a)(2) "provides relief to those aggrieved by an act or failure to act under 'Section 794 of this title' " and that "Hurst is not claiming to have been 'excluded from participation in' or 'denied the benefits of' or 'subjected to discrimination under' any federal program as a result of her disability." (Report and Recommendation at 4.)

[2] § 722. Eligibility and individualized plan for employment

> (c) Procedures.
>
> . . . . .
>
> (5) Hearings.
>
> . . . . .
>
> (J) Civil action.
> (i) In general. Any party aggrieved by a final decision described in subparagraph (I), may bring a civil action for review of such decision. The action may be brought in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

II. DISCUSSION

An in-depth analysis of this specific issue-- § 722(c)(5)(J)(i) jurisdiction and a state's claim of Eleventh Amendment immunity--reveals to the Court that this is a novel issue that has yet to be addressed by or within the Fifth Circuit. In fact, as of the writing of this opinion, the Court has found only two cases, both unpublished, that attempt to resolve § 722(c)(5)(J)(i) jurisdiction and Eleventh Amendment immunity. *See White v. Vocational Rehab.*, 2004 WL 3049760 (D.Or. Dec.20, 2004) (finding that Oregon waived Eleventh Amendment immunity for § 722(c)(5)(J)(i) judicial review when it accepted federal funds), *adopted by White v. Vocational Rehab.*, 2005 WL 771395 (D.Or. Apr.5, 2005); *Richards v. Alibozek*, 2002 WL 1815918, at *5, 2002 Conn.Super. LEXIS 2262 (Conn.Super. June 26, 2002) (stating that "because the General Assembly has not waived sovereign immunity for suits under the Rehabilitation Act, the state court is not a court 'of competent jurisdiction' within § 722(c)(5)(J)(i).").[3] The Court, however, is confident in its ability to reach a decision based on a combination of information before it and the vast amount of Eleventh Amendment jurisprudence, for as Chief Justice Marshall opined, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803).

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[3] The Court does not reach to the issue of whether Texas may be sued in its own courts as provided for in § 722(c)(5)(J)(i). *See Alden v. Maine*, 527 U.S. 706, 754, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (holding that Congress cannot subject a state to suit in state court without its consent).

A. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution states the following:

> ***798** The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. The Fifth Circuit has instructed that "[t]he immunity afforded to states under the Eleventh Amendment 'implicates the fundamental constitutional balance between the Federal Government and the States.' Therefore, at its core, the Eleventh Amendment serves 'as an essential component of our constitutional structure.' " *Pace v. Bogalusa City Sch. Bd.,* 403 F.3d 272, 276 (5th Cir.2005) (en banc) (citations omitted).

B. Exceptions to Eleventh Amendment Immunity

Eleventh Amendment immunity, however, is not absolute in the protection it affords a state from law suits. *See id.* Congress may abrogate a state's Eleventh Amendment immunity by enacting legislation under the Fourteenth Amendment's § 5 Enforcement Clause[4] *See id.*

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[4] "The Congress shall have power to enforce, by appropriate legislation,

at 276-77. "Congress can single-handedly strip the states of their Eleventh Amendment immunity and thereby authorize federal court suits by individuals against the states. When Congress does this, it is exercising its power to abrogate Eleventh Amendment immunity."[5] *Id.* at 277. On the other hand, a state may waive its immunity or consent to suit in federal court. "[A] State's sovereign immunity is 'a personal privilege which it may waive at pleasure.' " *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (quoting *Clark v. Barnard,* 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883)). "The decision to waive that immunity, however, 'is altogether voluntary on the part of the sovereignty." ' *Id.* (quoting *Beers v. Ark.,* 61 U.S. 527, 20 How. 527, 529, 15 L.Ed. 991 (1857)). As the Fifth Circuit has illustrated, "[w]hen a state consents to suit or waives its Eleventh Amendment immunity, it knowingly and voluntarily forfeits the immunity's protections." *Pace,* 403 F.3d at 277 n. 13.

C. Article I Spending Clause Powers and Waiver of Eleventh Amendment Immunity

Section 102 of the Rehabilitation Act (as codified in 29 U.S.C. § 722) was enacted under Congress's Article I

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the provisions of this article." U.S. CONST. amend. XIV, § 5.

[5] Because § 102 of the Rehabilitation Act is legislation enacted via Congress's Article I Spending Clause powers, *see infra* Section C, the Court will not undertake an "abrogation" discussion, as the Supreme Court has "made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts." *Alden, supra* note 3, 527 U.S. at 712, 119 S.Ct. 2240 (explaining the holding in *Seminole Tribe v. Fla.*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)).

Spending Clause powers.[6] *See* Rehabilitation Act of 1973, 93 Pub.L. No. 112, 87 Stat. 355 (Sept. 26, 1973). The Rehabilitation Act Amendments of 1998 amended § 722 to include the private right of action for review of a hearing officer's decision in Federal court through § 722(c)(5)(J)(i). *See* Rehabilitation Act Amendments of 1998, 105 Pub.L. No. 220, 112 Stat. 936 (Aug. 7, 1998). The Supreme Court has "repeatedly characterized ... Spending Clause legislation as 'much in the nature of ***799** a *contract:* in return for federal funds, the recipients agree to comply with federally imposed conditions.' " *Barnes v. Gorman,* 536 U.S. 181, 186, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002) (emphasis in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)). "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* (quoting *Pennhurst,* 451 U.S. at 17, 101 S.Ct. 1531). To be valid, Spending Clause legislation must: 1) be in pursuit of the "general welfare;" 2) be unambiguous; 3) be reasonably related to the purpose of the expenditure to which they were attached; and 4) not be in violation of an independent constitutional provision. *See South Dakota v. Dole,* 483 U.S. 203, 207-08, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). Additionally, the financial inducement offered by Congress cannot "be so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.* at 211, 107 S.Ct. 2793 (quoting *Steward Machine Co. v. Davis,* 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937)). As a result:

> [i]f waiver results from participation in a Spending Clause program, the program must be a valid exercise of Congress's spending power; the waiver condition must satisfy the clear-statement rule (thereby ensuring that the

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[6] Allows Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

> state's waiver is "knowing"); and the program must be non-coercive (automatically establishing that the waiver is "voluntary").

Pace, 403 F.3d at 279.

D. Application of the Law to the Instant Case

The Department argues that § 102--unlike § 504 of the Rehabilitation Act, which through 42 U.S.C. § 2000d-7 provides a clear statement to the states that they must waive their Eleventh Amendment immunity in order to receive federal funds--does not provide a clear statement to the states of a waiver requirement of sovereign immunity in return for receipt of federal funds. Hurst counters that even though § 102 does not provide express or precise language requiring states to waive their immunity, § 722(c)(5)(J)(i) clearly indicates Congress's intent to condition the receipt of federal funds on states' waiver of sovereign immunity by requiring states to subject themselves to federal judicial review of any final state administrative decision. To support her contention that § 102 should receive the same amount of significance as § 504, Hurst cites to the Fifth Circuit's holding in *AT&T Comm. v. BellSouth Telecomm. Inc.*, a case addressing the 1996 Telecommunications Act. 238 F.3d 636 (5th Cir.2001); *see also MCI Telecom. Corp. v. Illinois Bell Tel. Co.,* 222 F.3d 323, 341 (7th Cir.2000) (holding that "[a]lthough the language of the statute [47 U.S.C. § 252] does not contain the express waiver language ... the structure of the pertinent section of the statute ... nevertheless makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section ....").[7] The question that this Court must then address is whether § 722(c)(5)(J)(i) indeed provides a clear statement to the states that they are waiving their Eleventh Amendment immunity. If this Court determines that Congress did not convey a clear statement to the states, then the Court need not resolve whether the states' waiver was knowing and voluntary.

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[7] The Court will discuss, *infra,* the comparison of the Telecommunications Act of 1996 to the Rehabilitation Act of 1973 for purposes of Eleventh Amendment Immunity.

The Supreme Court, in *Atascadero State Hosp. v. Scanlon*, held that Congress, through § 504 of the Rehabilitation Act, ***800** did not validly abrogate the states' Eleventh Amendment immunity, nor did it express a clear intent to condition the receipt of federal funds--made available to the states through Congress's Art. I, § 8 Spending Clause powers--on the states' waiver of their Eleventh Amendment immunity. 473 U.S. 234, 247, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). In response to *Atascadero,* Congress enacted § 2000d-7 to provide the clear statement that the Court had previously held that was lacking. Subsequently, a number of circuits, including the Fifth Circuit, *see Pederson v. Louisiana State Univ.,* 213 F.3d 858, 876 (5th Cir.2000), have held that § 504 clearly conditions the receipt of federal funds with waiver of Eleventh Amendment immunity. *See Nieves-Marquez v. Puerto Rico,* 353 F.3d 108, 129-30 (1st Cir.2003); *A.W. v. Jersey City Pub. Schs.,* 341 F.3d 234, 244-51 (3d Cir.2003); *Bruggeman v. Blagojevich,* 324 F.3d 906, 912 (7th Cir.2003); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.,* 344 F.3d 1288, 1292-93 (11th Cir.2003) (per curiam); *Lovell v. Chandler,* 303 F.3d 1039, 1051-52 (9th Cir.2002); *Robinson v. Kansas,* 295 F.3d 1183, 1189-90 (10th Cir.2002); *Nihiser v. Ohio EPA,* 269 F.3d 626, 628 (6th Cir.2001); *Jim C. v. United States,* 235 F.3d 1079, 1081 (8th Cir.2000) (en banc); *Stanley v. Litscher,* 213 F.3d 340, 344 (7th Cir.2000).

As the Department points out, § 102 of the Rehabilitation Act, unlike § 504 of the same act, contains no express or clear statement that states waive their immunity.

Hurst's citation to the Fifth Circuit's holding in *AT&T* to support her contention that the judicial review requirement of § 722(c)(5)(J)(i) constitutes a clear statement of Eleventh Amendment immunity waiver is not necessarily on point. In *AT&T*, the Fifth Circuit found that the Louisiana Public Service Commission constructively waived its sovereign immunity by accepting Congress's invitation to regulate local telecommunication competition under the Telecommunications Act of 1996. However, unlike the instant case, courts addressing sovereign immunity issues arising from the Telecommunications Act of 1996 were dealing with a statute in which "Congress, by enacting the 1996 Act pursuant to its commerce power, validly preempted the states' power to regulate local telecommunications competition." *AT&T Comm.*, 238 F.3d at 646 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n. 6, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)).

The Telecommunications Act invited the states to engage in "a limited mission, which they may accept or decline: to apply federal law and regulations as arbitrators and ancillary regulators within the federal system and on behalf of Congress." *Id.* (citing 42 U.S.C. § 252; however, intending to cite 47 U.S.C. § 252). A portion of that invitation included being subject to federal judicial review under the Telecommunications Act pursuant to 47 U.S.C. § 252(e)(6). Therefore, the states were put on notice, and the Telecommunications Act provided a clear statement, that if the states wished to accept this limited mission, they had to acquiesce to the waiver of their Eleventh Amendment immunity.

The Court is in agreement with the Department that the Rehabilitation Act of 1973 is distinguishable from the Telecommunications Act of 1996, because it does not involve any preemption of states' powers. The Rehabilitation

Act's purpose is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society ...." 29 U.S.C. § 701(b)(1). The Act further crystalizes its objective as one of ensuring "that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals ***801** with significant disabilities, and in *assisting States and providers of services* in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living." 29 U.S.C. § 701(b)(2) (emphasis added). With regards to the Rehabilitation Act, Congress has made it clear that it is supporting the states through its obligation to provide for the "general welfare" of the nation. Congress did not preempt any states' powers and then invite the states to participate in any activities under § 102 of the Rehabilitation Act by conditioning the participation with the waiver of their sovereign immunity through § 722(c)(5)(J)(i).

Congress has not established any clear intent that would put the states on notice that they are waiving Eleventh Amendment immunity under § 102. The 1998 amendments to § 102 of the Rehabilitation Act, specifically § 722(c)(5)(J)(i), simply do not rise to the level of a clear statement that is required of legislation enacted through Congress's Article I Spending Clause powers. As the Fifth Circuit has ruled, in its interpretation of Supreme Court precedent of the clear-statement rule, "[i]n our reading ... the only 'knowledge' that the Court is concerned about is a state's knowledge that a Spending Clause condition requires waiver of immunity ...." *Pace,* 403 F.3d at 279. Congress has met this burden in § 504, through 42 U.S.C. § 2000d-7, and in other instances, including 20 U.S.C. § 1403(a)[8] as applied to the Individuals with Disabilities Education Act ("IDEA") ("20 U.S.C. § 1400 et seq."). Congress, when it amended § 102 in 1998 and provided for judicial review in Federal court of states' final administrative decisions, had the ability to afford § 102 with the same clear statement of potential Eleventh Amendment immunity implications that it gave to § 504 and the IDEA Act. The fact that Congress chose not to do so indicates to this Court that § 722(c)(5)(J)(i), and its option of judicial review of a final state administrative decision, is not to be viewed through the same prism as the remedial in nature 29 U.S.C. § 794a or 20 U.S.C. § 1403.

> § 1403. Abrogation of State sovereign immunity
> (a) In general. A State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this title [20 U.S.C. § § 1400 et seq.].

This Court recognizes the Fifth Circuit's statement that "[j]ust because particular language may or may not function with equal efficacy under both exceptions to Eleventh Amendment immunity, does not mean that it fails the clear-statement rule," *id.* at 287. This Court further recognizes the Fifth Circuit's admonishment that Congress need not use precise or "magical" words to signal to the states an abrogation or invitation to waive immunity. However, this Court does not read Fifth Circuit precedent to signify that any reference, however slight, to "Federal courts"--such as § 722(c)(5)(J)(i)--satisfies the "clear-statement" rule.

Unfortunately for Hurst, Congress has not met the clear-statement burden regarding § 102. Thus, because Congress has not provided a clear statement that it was conditioning the receipt of federal funds in return for states' waiver of Eleventh Amendment immunity, the states have had, and continue to have, the ability to invoke Eleventh Amendment immunity because of the lack of opportunity to make a knowing and voluntary waiver of their Eleventh Amendment immunity. This Court does not retain subject matter jurisdiction under § 722(c)(5)(J)(i) so long as Texas refuses to abdicate its constitutional ***802** prerogative to Eleventh Amendment sovereign immunity.

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[8] The Court will discuss, *infra,* the comparison of the Telecommunications Act of 1996 to the Rehabilitation Act of 1973 for purposes of Eleventh Amendment Immunity.

III. CONCLUSION

The Court, based on the reasons previously stated, **DOES NOT ADOPT** the Report and Recommendation of the United States Magistrate Judge. Due to the novelty of the issue at hand and the possibility of further review by appellate courts, it is hereby **ORDERED** that the Defendants' motion to dismiss is **GRANTED** and the Plaintiff's case is **DISMISSED WITHOUT PREJUDICE**. The Defendants' request that all costs in this case be assessed against the Plaintiff is **DENIED**.

SIGNED this 22nd day of September, 2005.

/s/

ALIA MOSES LUDLUM
UNITED STATES DISTRICT JUDGE

APPENDIX C

REPORT AND RECOMMENDATION
OF THE UNITED STATES
MAGISTRATE JUDGE,
WESTERN DISTRICT OF TEXAS,
DEL RIO DIVISION,

DATED MAY 19, 2005

FILED MAY 20, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

LOUISE ELIZABETH HURST §
Plaintiff §
§
vs. § **DR-O3-CA-104**
§
TEXAS DEPT. OF ASSISTIVE §
AND REHABILITATIVE §
SERVICES, et al §
Defendants §

Report and Recommendation of the United States Magistrate Judge

Pending is Defendants' First Amended Motion to Dismiss (Docket Entry #28).

For the following reasons, this United States Magistrate Judge recommends that the Motion be denied.

Facts/Procedural History

The facts presenting this section are taken from the Plaintiff's First Amended Complaint. These allegations will be taken as true for purposes of ruling on the Defendants' First Amended Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Plaintiff Louise Elizabeth Hurst ("Hurst") had a productive work history until she was diagnosed with cervical spine damage in June 2002. She sought help from the Texas Rehabilitative Services, hereinafter "the Department"), which determined that she was eligible for vocational rehabilitation services and referral her to a neurologist for a consultation. The neurologist told Hurst that she could die or become paralyzed at any moment if the cervical spine damage progressed and recommended immediate surgery to fuse her cervical vertebrae.

At Hurst's request, the Department approved a second opinion consultation with a neurosurgeon. The neurosurgeon also recommended immediate surgery to fuse the vertebrae as well as instrumentation to support the neck and head. Additionally, he referred Hurst to an infectious disease specialist to determine the nature and extent of an infection in Hurst's neck before setting a date for surgery. With the Department's approval, Hurst consulted an infectious disease specialist in March 2003. The infectious disease specialist requested tests to determine the nature of the infection.

On or about March 17, 2003, Hurst's caseworker indicated by telephone that the Department had approved the tests requested by the infectious disease specialist and the surgery to fuse the vertebrae. Later that moment, however, Hurst's caseworker told her in person that the surgery and tests were not approved by a letter dated May 31, 2003, and the Department denied Hurst further medical treatment.

Hurst tiled a timely appeal of the denial of medical treatment. Following a hearing, the Hearing Officer affirmed the agency's decision in September 2003. Hurst then filed a motion for reconsideration, which was denied in October 2003. Having exhausted her administrative remedies, Hurst now seeks judicial review of the Department's denial of medical treatment pursuant to 29 U.S.C. § 722(C)(5)(J), asserting that the Department's decision to deny her medical treatment is in violation of the Rehabilitation Act of 1973, as amended 29 U.S.C. § 701 et seq. and 34 C.F.R. 361 et. Seq. and is not in accordance with the evidence.[1]

The Defendants have filed the instant Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending that federal question jurisdiction under 28 U.S.C. § 1331 is barred by the Eleventh Amendment, that Hurst's has failed to state a claim under § 504 of the Rehabilitation Act (as codified in 29 U.S.C. § 794) and that his court should abstain from consideration of the case pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In her response, Hurst argues that the Department has waived its Eleventh Amendment immunity for Rehabilitation Act violations by its receipt of federal funds pursuant to 42 U.S.C. §2000d-7, that she has stated a claim for relief pursuant to 29 U.S.C. §794a(a)(2) that that the abstention doctrine is inapplicable to this case.

Analysis

Federal Rule of Civil Procedure 12(b) permits the filling of a motion to dismiss for "91) lack of jurisdiction over the subject matter" or "(6) failure to state a claim upon which relief can be granted." Federal Rule of Civil Procedure 12 (h)(3) provides that if "the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

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[1] Hurst initiated the instant case on November 21, 2003. The Defendants filed a Motion to Dismiss in March 2004, which was denied without prejudice due to an erroneous citation of jurisdiction statute in the original Complaint. She was allowed to replead and filed an amended complaint in January 2005, to which the Defendant's filed the instant motion to dismiss.

I. Subject Matter Jurisdiction

Hurst asserts that this court has subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331, 29 U.S.C. § 722 and 29 U.S.C. § 794a (a) (2). 28 U.S.C. § 1331, concerning federal question jurisdiction, provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 29 U.S.C. § 722 concerns eligibility for vocation rehabilitation services and individualized plans for employment. 29 U.S.C. § 722 (c) (5)(J) provides that "any party aggrieved by" a final decision of a hearing officer (presumably about eligibility for services and individualized plans for employment) may seek judicial review in either state of federal court. Clearly, Hurst has a right to seek review of the hearing officer's decision in federal court pursuant to 29 U.S.C. § 722 (c) (5) (J).

Hurst also cites 29 U.S.C. § 794a (a)(2) as a basis for this court's jurisdiction. However, a plain reading of this statute reveals that it is inapplicable to her case. 29 U.S.C. § 794a (a)(2) states:

> The remedies, procedure and rights set forth in VI of the Civil Rights Act of 1964 [42 U.S.C. §2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal Assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. § 794(a). Hurst is not claiming to have been "excluded from participation in" or "denied the benefits of" or "subjected to discrimination under" any federal program as a result of her disability. The undersigned agrees with the Defendant that:

> This is not a case where the [Hurst} was denied services that would have been available to an individual without a disability on the basis of her disability. Rather, it is an administrative appeal of a denial of benefits that [Hurst} claims to be appropriate for her condition. But for her disability, [Hurst] claims to be appropriate for her condition. But for her disability, [Hurst] would not have been eligible for this program [vocational rehabilitation services' at all.

Defendant's First Amended Motion to Dismiss, page 8. Thus, the undersigned agrees with the Department that Hurst has failed to state a claim pursuant to 29 U.S.C. § 794 (a)(2). However, this court must still address whether Hurst might obtain relief under 29 U.S.C. § 722.

The Department suggests that is a plaintiff fails to state a disability discrimination claim under § 794, that they do not state a claim at all under the Rehabilitation Act. As authority, they cite Second Circuit authority holding that people filing lawsuits over vocational rehabilitation benefits that do not allege discrimination do not state a claim under § 794 and thus, that their lawsuits are subject to dismissal. *See P.C. v. McLaughlin*, 913 F.2d 1033 (2nd Cir. 1990), *Flight v. Gloeckler*, 68 F.3d 61 (2nd Cir. 1995), *Doe v. Pfrommer*, 148 F.3d 73 (2nd Cir. 1998). However, the undersigned notes that these cases all predate the amendment of 29 U.S.C. § 722 to include the private right of action for review of hearing officer decisions now provided in 29 U.S.C. § 722 (c)(5)(J). This amendment was enacted as part of Public Law 105-220 on August 7, 1998. In contrast, the latest of the Second Circuit cases cited by the Department-*Doe v. Pfrommer*- was decided on June 10, 1998. Thus, while the dismissal of these cases might have been proper under the law then in effect, such a dismissal is not necessarily warranted at the present time for failure to allege discrimination because a private right of action for review of a hearing officer's decision regarding eligibility for benefits and/or individualized plan for employment has since become available. In sum, the undersigned finds that although Hurst has failed to state a claim under § 794 or § 794a, that she has stated a claim pursuant to 29 U.S.C. § 722 and this court has jurisdiction to hear the claim. *See White v. Vocational Rehabilitation*, 2004 WL 3049760 (D.Or. 2004) (implicitly recognizing cause of action under 29 U.S.C. § 722 (c)(5)(J) in case seeking judicial review of determination that claimant was not longer entitled to vocational rehabilitation services despite not reaching question of whether discriminatory intent was required to award damages and ultimately dismissing case because state appellate courts had already reviewed case thus depriving district court of original jurisdiction).

II. Eleventh Amendment Immunity

The Department contends, however, that Hurst's claims are barred by the Eleventh Amendment. Generally, the Eleventh Amendment prevents individual citizens from suing a state (or its agencies) in federal court. However, Congress may abrogate this Eleventh Amendment immunity by acting under Section 5 of the Fourteenth Amenment and "a state may consent to suit I federal court." *Pace v. Bogalusa City School Bd.*, 403 F3d. 272, 279 (5th Cir. 2005). A state may, for example, waive its Eleventh Amendment immunity to suit concerning a particular federal program by accepting federal funds for that program if Congress explicitly conditions receipt of funds for the program on a state's consent to waive its sovereign immunity in a constitutionally permissible manner. Waiver must be knowing and voluntary. *Id.* At 279. To satisfy the "knowing" prong of waiver of Eleventh Amendment immunity, a statute must contain a clear statement conditioning acceptance of federal funds on waiving immunity. If a clear statement is made, the "voluntary" requirement is generally satisfied unless the spending program is coercive. *Id.* At 279-80. Although a clear statement is required, there is no need to use "magic" words like "waiver" or "consent". *Id.* At 281.

The Department asserts that there is no clear statutory statement providing that states do not enjoy Eleventh Amendment immunity for claims pursued under § 722. In contrast, the Department points to 42U.S.C. § 2000d-7, § 794 would not by itself waive Eleventh Amendment immunity and subject the states to suit by an individual. By analogy, they contend that without a clear statement linking § 722 to a Congressional intent to waive Eleventh Amendment immunity, there is not waiver of immunity.

Hurst, on the hand, counters by arguing that § 722 clearly shows an intent that states waive Eleventh Amendment immunity by accepting federal vocational rehabilitation funds and cities a telecommunications case for the proposition that judicial review requirement in a federal regulatory statute clearly states a Congressional intent that states waive Eleventh Amendment immunity by accepting federal funds for that program. *See AT&T Comm. V. Bellsouth Telecom.*, 283 F.3d 636, 646-47 (5th Cir. 2001), following *MCR Telecom. Corp. v. Illinois Bell Tel. Co.*, 222 F.D 233, 341-344 (7th Cir. 2000). Her argument seems meritorious, as the Fifth Circuit specifically cited *AT&T* in stating that no "magic words" were required to make a clear statement to abrogate or waive sovereign immunity in *Pace* at 8:

> Just because particular language may or may not function with equal efficacy under both exceptions to Eleventh Amendment immunity, does not mean that it fails the clear-statement rule. As we concluded in *AT&T*, the rule requires only that "the state has been put on notice clearly and unambiguously by the federal statute that the state's particular conduct or transaction with subject it to federal court suits brought by individuals."

(Footnote omitted). As 29 U.S.C. § 722 (c)(5)(J) establishes right to judicial review in federal court of a hearing officer decision regarding eligibility for benefits, the right of judicial review in federal court would be a nullity if a state is considered to enjoy Eleventh Amendment immunity for such suits. Thus, the undersigned finds that the state has waived its Eleventh Amendment immunity for suits such as Hurt's seeking judicial review of a denial of vocational rehabilitation benefits.

III. Abstention

The Department contends that this court should abstain from hearing this case under the *Burford*[2] abstention doctrine described *in Baran v. Port of Beaumont Nav. Dist, of Jefferson County TX*, 57 F.3d 436 (5th Cir. 1995):

> "[w]here timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult

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[2] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

> questions of state law hearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern/" *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 588 (5th Cir. 1994) (quoting *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361, 109 S.Ct. 2506, 2514-15, 105 L.Ed.2d 298 (1989)).

Baran at 441. There mere availability of an alternate forum in state court does not dictate that a federal court must abstain, however. The discretion to abstain is narrow, because it must be exercised within the narrow and specific limits prescribed by a particular abstention doctrine. [3] *Wilson v. Valley Electric Membership Corp.*, 8 F. 3d 311, 313 (5th Cir. 1993). In deciding whether to abstain under *Burford*, the Fifth Circuit has directed that the following factors should be considered: (1) "whether the cause of action arises under federal or state law", (3) "the importance of the state interest involved", (4) "the state's need for a coherent policy in that area", and (5) "the presence of a special state forum for judicial review." *Wilson* at 314.

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[3] *Burford* is the only abstention doctrine argued by the parties and appears to be the only abstention doctrine that might be applicable to the instant case. Other abstention doctrines include those created by *Younger v. Harris*, 401 U.S. 37 (1971) (abstention due to pending state proceedings), *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 498 (1941) (abstention where a federal constitutional decision depends on the construction of state law) and *Colorado River Water Conservation Dis.*, 424 U.S. 800 (1976) (abstention where parallel state and federal proceedings concerning identical subject matter are pending).

In that present case, 1) the cause of action clearly arises under federal law (29 U.S.C. §722) 3) obviously the state has an important interest in whether it has to pay such benefits, and 5) review in regular state court is available[4] but there does not seem to be a "special state forum" set up for reviewing vocational rehabilitation claims. Next, this court must consider whether inquiry is required into unsettled areas of state law and the state's need for a coherent policy in the area so it must determine whether the issue of exploratory surgery is governed by the state or federal law or a combination of the two. In making his decision, the Hearing Officer state that he took notice of both federal and state materials, namely: the Rehabilitation Act of 1973, as amended and codified in 29 U.S.C. §§ 701 et seq., United States Department of Education Regulations concerning State Vocational Rehabilitation Services Program found at 34 C.F.R. §§361.1 et seq., the Texas Human Resources Code §§ 111.001 et seq., Texas Rehabilitation Commission (TRC) Regulations found at 40 Tex. Admin. Code §§101.1 et seq., the TRC State Plan for Vocational Rehabilitation Services and the TRC Rehabilitation Services Manual (RSM) (Hearing Officer Decision, page 1). In his conclusions of law, he specifically relies on Chapters 5 and 17 of the RSM, which both simply state that exploratory surgery for back disorders will not be authorized. The undersigned was unable to find, nor have the parties cited, an express exclusion of coverage for exploratory surgery in the other state and federal materials reviewed by the Hearing Officer although federal authorities provide coverage for "corrective" or "therapeutic" surgeries[5], which might imply that exploratory surgeries are not covered. The undersigned appreciates the Department's argument that since there are apparently no recorded Texas cases concerning coverage of exploratory surgeries as a part of the vocational rehabilitation services program, that the better course might be to abstain and let Texas state courts decide what constitutes surgery and review the Department's policies and procedures regarding this issue. However, with only a simple statement in a manual that exploratory surgeries are not covered and a possible implicit exclusion of exploratory surgery in federal statutes and regulations, this does not appear to be an overly complex or highly regulated area of state law and is not even exclusively a questions of state law. The undersigned finds that a federal court would be equally qualified to determine whether the Hearing Officer properly found that benefits should be denied as coverage for exploratory surgery and whether this decision comported with the federal Vocational Rehabilitation Act. Furthermore, the undersigned is reluctant to recommend abstention as it would occasion further delay and the plaintiff has alleged that her condition might become critical at any time. Thus, the undersigned finds that abstention under *Burford* would not be appropriate in the case.

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[4] The Department points out that Hurst has available timely and adequate review in state court as the Texas Supreme Court has held that the Texas Administrative Procedures Act, Tex. Gov't Code §2001.171, provides for judicial review of all decisions in contested cases before state agencies in *Texas Dept. of Protective and Regulatory Svcs. V. Mega Child Care, Inc.* 145 S.W. 2d 170, 173 (Tex. 2004).

Recommendation

1. For the foregoing reasons, the undersigned recommends that the Defendant's Motion to Dismiss be **DENIED**.

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[5] 29 U.S.C. § 723 (a)(6) provides for coverage for "corrective surgery or therapeutic treatment" to help individuals become employable if they do not have financial support for such treatment through other means such as health insurance. 34 C.F.R. § 361.5 (40) defines "physical and mental restoration services" as "corrective surgery or therapeutic treatment . . . "

2. The parties may wish to file objections to the above recommendations. Failure to file written objections to the findings and recommendations contained in this report within ten (10) days from the date of its receipt shall bar an aggrieved party from receiving a *de novo* review by the District Court of the findings and recommendations contained herein, see 28 U.S.C. § 636 (b)(1)(c), and shall bar an aggrieved party "except upon grounds of plain error from attacking on appeal the unobjected-to proposed factual findings legal conclusions accepting by the District Court." *See Douglass v. United States Servs. Automobile Ass'n*, 79 F.3d 1415, 1429, (5th Cir. 1996). **The Clerk shall promptly mail copies of the report to all parties and their counsel by certified mail, return receipt requested.**

SIGNED on this 19th day of May, 2005.

/s/
DENNIS G. GREEN
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

THE UNITED STATES CONSTITUTION

PROVISIONS CITED

Article I. Section 8

Clause 1: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

UNITED STATES CODE
TITLE 28. JUDICIARY

CHAPTER 81. COURTS OF APPEALS

28 USC § 1254(1)

§ 1254. Courts of Appeals; Certiorari; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . .

CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 USC § 1331

§ 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CHAPTER 151. DECLARATORY JUDGMENTS

28 USC § 2201

§ 2201. Creation of Remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

UNITED STATES CODE
TITLE 29 - LABOR
CHAPTER 16 - VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES

GENERAL PROVISIONS

29 USC § 701

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§ 701. Findings; purpose; policy

(a) Findings. Congress finds that -

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

(3) disability is a natural part of the human experience and in no way diminishes the right of individuals to -

(A) live independently;

(B) enjoy self-determination;

(C) make choices;

(D) contribute to society;

(E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;

(4) increased employment of individuals with disabilities can be achieved through implementation of statewide workforce investment systems under title I of the Workforce Investment Act of 1998 [29 U.S.C. 2801 et seq.] that provide meaningful and effective participation for individuals with disabilities in workforce investment

activities and activities carried out under the vocational rehabilitation program established under subchapter I of this chapter, and through the provision of independent living services, support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to -

(A) make informed choices and decisions; and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

(b) Purpose. The purposes of this chapter are -

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through -

(A) statewide workforce investment systems implemented in accordance with title I of the Workforce Investment Act of 1998 [29 U.S.C. 2801 et seq.] that include, as integral components, comprehensive and coordinated state-of-the-art programs of vocational rehabilitation;

(B) independent living centers and services;

(C) research;

(D) training;

(E) demonstration projects; and

(F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals

with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

(c) Policy. It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of -

(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;

(2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals;

(3) inclusion, integration, and full participation of the individuals;

(4) support for the involvement of an individual's representative if an individual with a disability requests, desires, or needs such support; and

(5) support for individual and systemic advocacy and community involvement.

29 USC § 702

§ 702. Rehabilitation Services Administration

(a) There is established in the Office of the Secretary a Rehabilitation Services Administration which shall be headed by a Commissioner (hereinafter in this chapter referred to as the "Commissioner") appointed by the President by and with the advice and consent of the Senate. Except for subchapters IV and V of this chapter and as otherwise specifically provided in this chapter,' such Administration shall be the principal agency, and the

Commissioner shall be the principal officer, of such Department for carrying out this chapter. The Commissioner shall be an individual with substantial experience in rehabilitation and in rehabilitation program management. In the performance of the functions of the office, the Commissioner shall be directly responsible to the Secretary or to the Under Secretary or an appropriate Assistant Secretary of such Department, as designated by the Secretary. The functions of the Commissioner shall not be delegated to any officer not directly responsible, both with respect to program operation and administration, to the Commissioner. Any reference in this chapter to duties to be carried out by the Commissioner shall be considered to be a reference to duties to be carried out by the Secretary acting through the Commissioner. In carrying out any of the functions of the office under this chapter, the Commissioner shall be guided by general policies of the National Council on Disability established under subchapter IV of this chapter.

(b) The Secretary shall take whatever action is necessary to ensure that funds appropriated pursuant to this chapter are expended only for the programs, personnel, and administration of programs carried out under this chapter.

29 USC § 703

§ 703. Advance funding

(a) For the purpose of affording adequate notice of funding available under this chapter, appropriations under this chapter are authorized to be included in the appropriation Act for the fiscal year preceding the fiscal year for which they are available for obligation.

(b) In order to effect a transition to the advance funding method of timing appropriation action, the authority provided by subsection (a) of this section shall apply notwithstanding that its initial application will result in the enactment in the same year (whether in the same appropriation Act or otherwise) of two separate appropriations, one for the *then current fiscal year and one* for the succeeding fiscal year.

29 USC § 704

§ 704. Joint funding

Pursuant to regulations prescribed by the President, and to the extent consistent with the other provisions of this chapter, where funds are provided for a single project by more than one Federal agency to an agency or organization assisted under this chapter, the Federal agency principally involved may be designated to act for all in administering the funds provided, and, in such cases, a single non-Federal share requirement may be established according to the proportion of funds advanced by each agency. When the principal agency involved is the Rehabilitation Services Administration, it may waive any grant or contract requirement (as defined by such regulations) under or pursuant to any law other than this chapter, which requirement is inconsistent with the similar requirements of the administering agency under or pursuant to this chapter.

29 USC § 705

§ 705. Definitions

For the purposes of this chapter:

(1) Administrative costs.

The term "administrative costs" means expenditures incurred in the performance of administrative functions under the vocational rehabilitation program carried out under subchapter I of this chapter, including expenses related to program planning, development, monitoring, and evaluation, including expenses for -

(A) quality assurance;

(B) budgeting, accounting, financial management, information systems, and related data processing;

(C) providing information about the program to the public;

(D) technical assistance and support services to other State agencies, private nonprofit organizations, and businesses and industries, except for technical assistance and support services described in section 723(b)(5) of this title;

(E) the State Rehabilitation Council and other advisory committees;

(F) professional organization membership dues for designated State unit employees;

(G) the removal of architectural barriers in State vocational rehabilitation agency offices and State operated rehabilitation facilities;

(H) operating and maintaining designated State unit facilities, equipment, and grounds;

(I) supplies;

(J) administration of the comprehensive system of personnel development described in section 721(a)(7) of this title, including personnel administration, administration of affirmative action plans, and training and staff development;

(K) administrative salaries, including clerical and other support staff salaries, in support of these administrative functions;

(L) travel costs related to carrying out the program, other than travel costs related to the provision of services;

(M) costs incurred in conducting reviews of rehabilitation counselor or coordinator determinations under section 722(c) of this title; and

(N) legal expenses required in the administration of the program.

(2) Assessment for determining eligibility and vocational rehabilitation needs

The term "assessment for determining eligibility and vocational rehabilitation needs" means, as appropriate in each case -

(A)(i) a review of existing data -

(I) to determine whether an individual is eligible for vocational rehabilitation services; and

(II) to assign priority for an order of selection described in section 721(a)(5)(A) of this title in the States that use an order of selection pursuant to section 721(a)(5)(A) of this title; and

(ii) to the extent necessary, the provision of appropriate assessment activities to obtain necessary additional data to make such determination and assignment;

(B) to the extent additional data is necessary to make a determination of the employment outcomes, and the nature and scope of vocational rehabilitation services, to be included in the individualized plan for employment of an eligible individual, a comprehensive assessment to determine the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment, of the eligible individual, which comprehensive assessment -

(i) is limited to information that is necessary to identify the rehabilitation needs of the individual and to develop the individualized plan for employment of the eligible individual;

(ii) uses, as a primary source of such information, to the maximum extent possible and appropriate and in accordance with confidentiality requirements -

(I) existing information obtained for the purposes of determining the eligibility of the individual and assigning priority for an order of selection described in section 721(a)(5)(A) of this title for the individual; and

(II) such information as can be provided by the individual and, where appropriate, by the family of the individual;

(iii) may include, to the degree needed to make such a determination, an assessment of the personality, interests, interpersonal skills, intelligence and related functional capacities, educational achievements, work experience, vocational aptitudes, personal and social adjustments, and employment opportunities of the individual, and the medical, psychiatric, psychological, and other pertinent vocational, educational, cultural, social, recreational, and environmental factors, that affect the employment and rehabilitation needs of the individual; and

(iv) may include, to the degree needed, an appraisal of the patterns of work behavior of the individual and services needed for the individual to acquire occupational skills, and to develop work attitudes, work habits, work tolerance, and social and behavior patterns necessary for successful job performance, including the utilization of work in real job situations to assess and develop the capacities of the individual to perform adequately in a work environment;

(C) referral, for the provision of rehabilitation technology services to the individual, to assess and develop the capacities of the individual to perform in a work environment; and

(D) an exploration of the individual's abilities, capabilities, and capacity to perform in work situations, which shall be assessed periodically during trial work experiences, including experiences in which the individual is provided appropriate supports and training.

(3) Assistive technology device

The term "assistive technology device" has the meaning given such term in section 3002 of this title, except that the reference in such section to the term "individuals with disabilities" shall be deemed to mean more than one individual with a disability as defined in paragraph (20)(A).

(4) Assistive technology service

The term "assistive technology service" has the meaning given such term in section 3002 of this title, except that the reference in such section -

(A) to the term "individual with a disability" shall be deemed to mean an individual with a disability, as defined in paragraph (20)(A); and

(B) to the term "individuals with disabilities" shall be deemed to mean more than one such individual.

(5) Community rehabilitation program

The term "community rehabilitation program" means a program that provides directly or facilitates the provision of vocational rehabilitation services to individuals with disabilities, and that provides, singly or in combination, for an individual with a disability to enable the individual to maximize opportunities for employment, including career advancement -

(A) medical, psychiatric, psychological, social, and vocational services that are provided under one management;

(B) testing, fitting, or training in the use of prosthetic and orthotic devices;

(C) recreational therapy;

(D) physical and occupational therapy;

(E) speech, language, and hearing therapy;

(F) psychiatric, psychological, and social services, including positive behavior management;

(G) assessment for determining eligibility and vocational rehabilitation needs;

(H) rehabilitation technology;

(I) job development, placement, and retention services;

(J) evaluation or control of specific disabilities;

(K) orientation and mobility services for individuals who are blind;

(L) extended employment;

(M) psychosocial rehabilitation services;

(N) supported employment services and extended services;

(O) services to family members when necessary to the vocational rehabilitation of the individual;

(P) personal assistance services; or

(Q) services similar to the services described in one of subparagraphs (A) through (P).

(6) Construction; cost of construction

(A) Construction

The term "construction" means -

(i) the construction of new buildings;

(ii) the acquisition, expansion, remodeling, alteration, and renovation of existing buildings; and

(iii) initial equipment of buildings described in clauses (i) and (ii).

(B) Cost of construction

The term "cost of construction" includes architects' fees and the cost of acquisition of land in connection with construction but does not include the cost of offsite improvements.

(7) [Repealed]

(8) Designated State agency; designated State unit

(A) Designated State agency

The term "designated State agency" means an agency designated under section 721(a)(2)(A) of this title.

(B) Designated State unit

The term "designated State unit" means -

(i) any State agency unit required under section 721(a)(2)(B)(ii) of this title; or

(ii) in cases in which no such unit is so required, the State agency described in section 721(a)(2)(B)(i) of this title.

(9) Disability

The term "disability" means -

(A) except as otherwise provided in subparagraph (B), a physical or mental impairment that constitutes or results in a substantial impediment to employment; or

(B) for purposes of sections 701, 711, and 712 of this title, and subchapters II, IV, V, and VII of this chapter, a physical or mental impairment that substantially limits one or more major life activities.

(10) Drug and illegal use of drugs

(A) Drug

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(B) Illegal use of drugs

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(11) Employment outcome

The term "employment outcome" means, with respect to an individual -

(A) entering or retaining full-time or, if appropriate, part-time competitive employment in the integrated labor market;

(B) satisfying the vocational outcome of supported employment; or

(C) satisfying any other vocational outcome the Secretary may determine to be appropriate (including satisfying the vocational outcome of self-employment, telecommuting, or business ownership), in a manner consistent with this chapter.

(12) Establishment of a community rehabilitation program

The term "establishment of a community rehabilitation program" includes the acquisition, expansion, remodeling, or alteration of existing buildings necessary to adapt them to community rehabilitation program purposes or to increase their effectiveness for such purposes (subject, however, to such limitations as the Secretary may determine, in accordance with regulations the Secretary shall prescribe, in order to prevent impairment of the objectives of, or duplication of, other Federal laws providing Federal assistance in the construction of facilities for community rehabilitation programs), and may include such additional equipment and staffing as the Commissioner considers appropriate.

(13) Extended services

The term "extended services" means ongoing support services and other appropriate services, needed to support and maintain an individual with a most significant disability in supported employment, that -

(A) are provided singly or in combination and are organized and made available in such a way as to assist an eligible individual in maintaining supported employment;

(B) are based on a determination of the needs of an eligible individual, as specified in an individualized plan for employment; and

(C) are provided by a State agency, a nonprofit private organization, employer, or any other appropriate resource, after an individual has made the transition from support provided by the designated State unit.

(14) Federal share

(A) In general

Subject to subparagraph (B), the term "Federal share" means 78.7 percent.

(B) Exception

The term "Federal share" means the share specifically set forth in section 731(a)(3) of this title, except that with respect to payments pursuant to part B of subchapter I of this chapter to any State that are used to meet the costs of construction of those rehabilitation facilities identified in section 723(b)(2) of this title in such State, the Federal share shall be the percentages determined in accordance with the provisions of section 731(a)(3) of this title applicable with respect to the State.

(C) Relationship to expenditures by a political subdivision

For the purpose of determining the non-Federal share with respect to a State, expenditures by a political subdivision thereof or by a local agency shall be regarded as expenditures by such State, subject to such limitations and conditions as the Secretary shall by regulation prescribe.

(15) Governor

The term "Governor" means a chief executive officer of a State.

(16) Impartial hearing officer

(A) In general

The term "impartial hearing officer" means an individual -

(i) who is not an employee of a public agency (other than

an administrative law judge, hearing examiner, or employee of an institution of higher education);

(ii) who is not a member of the State Rehabilitation Council described in section 725 of this title;

(iii) who has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;

(iv) who has knowledge of the delivery of vocational rehabilitation services, the State plan under section 721 of this title, and the Federal and State rules governing the provision of such services and training with respect to the performance of official duties; and

(v) who has no personal or financial interest that would be in conflict with the objectivity of the individual.

(B) Construction

An individual shall not be considered to be an employee of a public agency for purposes of subparagraph (A)(i) solely because the individual is paid by the agency to serve as a hearing officer.

(17) Independent living core services

The term "independent living core services" means -

(A) information and referral services;

(B) independent living skills training;

(C) peer counseling (including cross-disability peer counseling); and

(D) individual and systems advocacy.

(18) Independent living services

The term "independent living services" includes -

(A) independent living core services; and

(B)(i) counseling services, including psychological, psychotherapeutic, and related services;

(ii) services related to securing housing or shelter, including services related to community group living, and supportive of the purposes of this chapter and of the subchapters of this chapter, and adaptive housing services (including appropriate accommodations to and modifications of any space used to serve, or occupied by, individuals with disabilities);

(iii) rehabilitation technology;

(iv) mobility training;

(v) services and training for individuals with cognitive and sensory disabilities, including life skills training, and interpreter and reader services;

(vi) personal assistance services, including attendant are and the training of personnel providing such services;

(vii) surveys, directories, and other activities to identify appropriate housing, recreation opportunities, and accessible transportation, and other support services;

(viii) consumer information programs on rehabilitation and independent living services available under this chapter, especially for minorities and other individuals with disabilities who have traditionally been unserved or underserved by programs under this chapter;

(ix) education and training necessary for living in a community and participating in community activities;

(x) supported living;

(xi) transportation, including referral and assistance for such transportation and training in the use of public transportation vehicles and systems;

(xii) physical rehabilitation;

(xiii) therapeutic treatment;

(xiv) provision of needed prostheses and other appliances and devices;

(xv) individual and group social and recreational services;

(xvi) training to develop skills specifically designed for youths who are individuals with disabilities to promote self-awareness and esteem, develop advocacy and self-empowerment skills, and explore career options;

(xvii) services for children;

(xviii) services under other Federal, State, or local programs designed to provide resources, training, counseling, or other assistance, of substantial benefit in enhancing the independence, productivity, and quality of life of individuals with disabilities;

(xix) appropriate preventive services to decrease the need of individuals assisted under this chapter for similar services in the future;

(xx) community awareness programs to enhance the understanding and integration into society of individuals with disabilities; and

(xxi) such other services as may be necessary and not inconsistent with the provisions of this chapter.

(19) Indian; American Indian; Indian American; Indian tribe

(A) In general

The terms "Indian", "American Indian", and "Indian American" mean an individual who is a member of an Indian tribe.

(B) Indian tribe

The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]).

(20) Individual with a disability

(A) In general

Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who -

(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and

(ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter.

(B) Certain programs; limitations on major life activitiesSubject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 711, and 712 of this title, and subchapters II, IV, V, and VII of this chapter, any person who -

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

(C) Rights and advocacy provisions

(i) In general; exclusion of individuals engaging in drug use

For purposes of subchapter V of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Exception for individuals no longer engaging in drug use

Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who -

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

(iii) Exclusion for certain services

Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under subchapters I, II, and III of this chapter, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

(iv) Disciplinary action

For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student who is an individual with a disability and who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against students who are not individuals with disabilities. Furthermore, the due process procedures at section 104.36 of title 34, Code of

Federal Regulations (or any corresponding similar regulation or ruling) shall not apply to such disciplinary actions.

(v) Employment; exclusion of alcoholics

For purposes of sections 793 and 794 of this title as such sections relate to employment, the term "individual with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(D) Employment; exclusion of individuals with certain diseases or infections

For the purposes of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

(E) Rights provisions; exclusion of individuals on basis of homosexuality or bisexuality

For the purposes of sections 791, 793, and 794 of this title -

(i) for purposes of the application of subparagraph (B) to such sections, the term "impairment" does not include homosexuality or bisexuality; and

(ii) therefore the term "individual with a disability" does not include an individual on the basis of homosexuality or bisexuality.

(F) Rights provisions; exclusion of individuals on basis of certain disorders

For the purposes of sections 791, 793, and 794 of this title, the term "individual with a disability" does not include an individual on the basis of -

(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

(G) Individuals with disabilities

The term "individuals with disabilities" means more than one individual with a disability.

(21) Individual with a significant disability

(A) In general

Except as provided in subparagraph (B) or (C), the term "individual with a significant disability" means an individual with a disability -

(i) who has a severe physical or mental impairment which seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills) in terms of an employment outcome;

(ii) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(iii) who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs described in subparagraphs (A) and (B) of paragraph (2) to cause comparable substantial functional limitation.

(B) Independent living services and centers for independent living

For purposes of subchapter VII of this chapter, the term "individual with a significant disability" means an individual with a severe physical or mental impairment whose ability to function independently in the family or community or whose ability to obtain, maintain, or advance in employment is substantially limited and for whom the delivery of independent living services will improve the ability to function, continue functioning, or move toward functioning independently in the family or community or to continue in employment, respectively.

(C) Research and training

For purposes of subchapter II of this chapter, the term "individual with a significant disability" includes an individual described in subparagraph (A) or (B).

(D) Individuals with significant disabilities

The term "individuals with significant disabilities" means more than one individual with a significant disability.

(E) Individual with a most significant disability

(i) In general

The term "individual with a most significant disability", used with respect to an individual in a State, means an individual with a significant disability who meets criteria established by the State under section 721(a)(5)(C) of this title.

(ii) Individuals with the most significant disabilities

The term "individuals with the most significant disabilities" means more than one individual with a most significant disability.

(22) Individual's representative; applicant's representative

The terms "individual's representative" and "applicant's representative" mean a parent, a family member, a guardian, an advocate, or an authorized representative of an individual or applicant, respectively.

(23) Institution of higher education

The term "institution of higher education" has the meaning given the term in section 1001 of title 20.

(24) Local agency

The term "local agency" means an agency of a unit of general local government or of an Indian tribe (or combination of such units or tribes) which has an agreement with the designated State agency to conduct a vocational rehabilitation program under the supervision of such State agency in accordance with the State plan approved under section 721 of this title. Nothing in the preceding sentence of this paragraph or in section 721 of this title shall be construed to prevent the local agency from arranging to utilize another local public or nonprofit agency to provide vocational rehabilitation services if such an arrangement is made part of the agreement specified in this paragraph.

(25) Local workforce investment board

The term "local workforce investment board" means a local workforce investment board established under section 117 of the Workforce Investment Act of 1998 [29 U.S.C. 2832].

(26) Nonprofit

The term "nonprofit", when used with respect to a community rehabilitation program, means a community rehabilitation program carried out by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual and the income of which is exempt from taxation under section 501(c)(3) of title 26.

(27) Ongoing support services

The term "ongoing support services" means services -

(A) provided to individuals with the most significant disabilities;

(B) provided, at a minimum, twice monthly -

(i) to make an assessment, regarding the employment situation, at the worksite of each such individual in supported employment, or, under special circumstances, especially at the request of the client, off site; and

(ii) based on the assessment, to provide for the coordination or provision of specific intensive services, at or away from the worksite, that are needed to maintain employment stability; and

(C) consisting of -

(i) a particularized assessment supplementary to the comprehensive assessment described in paragraph (2)(B);

(ii) the provision of skilled job trainers who accompany the individual for intensive job skill training at the worksite;

(iii) job development, job retention, and placement services;

(iv) social skills training;

(v) regular observation or supervision of the individual;

(vi) followup services such as regular contact with the employers, the individuals, the individuals' representatives, and other appropriate individuals, in order to reinforce and stabilize the job placement;

(vii) facilitation of natural supports at the worksite;

(viii) any other service identified in section 723 of this title; or

(ix) a service similar to another service described in this subparagraph.

(28) Personal assistance services

The term "personal assistance services" means a range of services, provided by one or more persons, designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform if the individual did not have a disability. Such services shall be designed to increase the individual's control in life and ability to perform everyday activities on or off the job.

(29) Public or nonprofit

The term "public or nonprofit", used with respect to an agency or organization, includes an Indian tribe.

(30) Rehabilitation technology

The term "rehabilitation technology" means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of and address the barriers confronted by individuals with disabilities in areas which include education, rehabilitation, employment, transportation, independent living, and recreation. The term includes rehabilitation engineering, assistive technology devices, and assistive technology services.

(31) Secretary

The term "Secretary", except when the context otherwise requires, means the Secretary of Education.

(32) State

The term "State" includes, in addition to each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(33) State workforce investment board

The term "State workforce investment board" means a State workforce investment board established under section 111 of the Workforce Investment Act of 1998 [29 U.S.C. 2821].

(34) Statewide workforce investment system

The term "statewide workforce investment system" means a system described in section 111(d)(2) of the Workforce Investment Act of 1998 [29 U.S.C. 2821(d)(2)].

(35) Supported employment

(A) In general

The term "supported employment" means competitive work in integrated work settings, or employment in integrated work settings in which individuals are working toward competitive work, consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individuals, for individuals with the most significant disabilities -

(i)(I) for whom competitive employment has not traditionally occurred; or

(II) for whom competitive employment has been interrupted or intermittent as a result of a significant disability; and

(ii) who, because of the nature and severity of their disability, need intensive supported employment services for the period, and any extension, described in paragraph (36)(C) and extended services after the transition described in paragraph (13)(C) in order to perform such work.

(B) Certain transitional employment

Such term includes transitional employment for persons who are individuals with the most significant disabilities due to mental illness.

(36) Supported employment services

The term "supported employment services" means ongoing support services and other appropriate services needed to support and maintain an individual with a most significant disability in supported employment, that -

(A) are provided singly or in combination and are organized and made available in such a way as to assist an eligible individual to achieve competitive employment;

(B) are based on a determination of the needs of an eligible individual, as specified in an individualized plan for employment; and

(C) are provided by the designated State unit for a period of time not to extend beyond 18 months, unless under special circumstances the eligible individual and the rehabilitation counselor or coordinator involved jointly agree to extend the time in order to achieve the employment outcome identified in the individualized plan for employment.

(37) Transition services

The term "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(38) Vocational rehabilitation services

The term "vocational rehabilitation services" means those services identified in section 723 of this title which are provided to individuals with disabilities under this chapter.

(39) Workforce investment activities

The term "workforce investment activities" means workforce investment activities, as defined in section 101 of the Workforce Investment Act of 1998 [29 U.S.C. 2801], that are carried out under that Act.

29 USC § 706

§ 706. Allotment percentage

(a)(1) For purposes of section 730 of this title, the allotment percentage for any State shall be 100 per centum less that percentage which bears the same ratio to 50 per centum as the per capita income of such State bears to the per capita income of the United States, except that -

(A) the allotment percentage shall in no case be more than 75 per centum or less than 33 1/3 per centum; and

(B) the allotment percentage for the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands shall be 75 per centum.

(2) The allotment percentages shall be promulgated by the Secretary between October 1 and December 31 of each even-numbered year, on the basis of the average of the per capita incomes of the States and of the United States for the three most recent consecutive years for which satisfactory data are available from the Department of Commerce. Such promulgation shall be conclusive for each of the 2 fiscal years in the period beginning on the October 1 next succeeding such promulgation.

(3) The term "United States" means (but only for purposes of this subsection) the 50 States and the District of Columbia.

(b) The population of the several States and of the United States shall be determined on the basis of the most recent data available, to be furnished by the Department of Commerce by October 1 of the year preceding the fiscal year for which funds are appropriated pursuant to statutory authorizations.

29 USC § 707

§ 707. Nonduplication

In determining the amount of any State's Federal share of expenditures for planning, administration, and services incurred by it under a State plan approved in accordance with section 721 of this title, there shall be disregarded -

(1) any portion of such expenditures which are financed by Federal funds provided under any other provision of law; and

(2) the amount of any non-Federal funds required to be expended as a condition of receipt of such Federal funds.

No payment may be made from funds provided under one provision of this chapter relating to any cost with respect to which any payment is made under any other provision of this chapter, except that this section shall not be construed to limit or reduce fees for services rendered by community rehabilitation programs.

29 USC § 708

§ 708. Application of other laws

The provisions of chapter 71 of title 31 and of title V of the Act of October 15, 1977 (Public Law 95-134) shall not apply to the administration of the provisions of this chapter or to the administration of any program or activity under this chapter.

29 USC § 709

§ 709. Administration

(a) Technical assistance; short-term traineeships; special projects; dissemination of information; monitoring and evaluations

In carrying out the purposes of this chapter, the Commissioner may -

(1) provide consultative services and technical assistance to public or nonprofit private agencies and

organizations, including assistance to enable such agencies and organizations to facilitate meaningful and effective participation by individuals with disabilities in workforce investment activities;

(2) provide short-term training and technical instruction, including training for the personnel of community rehabilitation programs, centers for independent living, and other providers of services (including job coaches);

(3) conduct special projects and demonstrations;

(4) collect, prepare, publish, and disseminate special educational or informational materials, including reports of the projects for which funds are provided under this chapter; and

(5) provide monitoring and conduct evaluations.

(b) Utilization of services and facilities; information task forces

(1) In carrying out the duties under this chapter, the Commissioner may utilize the services and facilities of any agency of the Federal Government and of any other public or nonprofit agency or organization, in accordance with agreements between the Commissioner and the head thereof, and may pay therefor, in advance or by way of reimbursement, as may be provided in the agreement.

(2) In carrying out the provisions of this chapter, the Commissioner shall appoint such task forces as may be necessary to collect and disseminate information in order to improve the ability of the Commissioner to carry out the provisions of this chapter.

(c) Rules and regulations

The Commissioner may promulgate such regulations as are considered appropriate to carry out the Commissioner's duties under this chapter.

(d) Regulations for implementation of order of selection for vocational rehabilitation services

The Secretary shall promulgate regulations regarding the requirements for the implementation of an order of selection for vocational rehabilitation services under section 721(a)(5)(A) of this title if such services cannot be provided to all eligible individuals with disabilities who apply for such services.

(e) Regulations to implement amendments

Not later than 180 days after August 7, 1998, the Secretary shall receive public comment and promulgate regulations to implement the amendments made by the Rehabilitation Act Amendments of 1998.

(f) Limitation on regulations

In promulgating regulations to carry out this chapter, the Secretary shall promulgate only regulations that are necessary to administer and ensure compliance with the specific requirements of this chapter.

(g) Authorization of appropriations

There are authorized to be appropriated to carry out this section such sums as may be necessary.

29 USC § 710

§ 710. Reports

(a) Annual reports required

Not later than one hundred and eighty days after the close of each fiscal year, the Commissioner shall prepare and submit to the President and to the Congress a full and complete report on the activities carried out under this chapter, including the activities and staffing of the information clearinghouse under section 712 of this title.

(b) Collection of information

The Commissioner shall collect information to determine whether the purposes of this chapter are being met and to assess the performance of programs carried out under this chapter. The Commissioner shall take whatever action is necessary to assure that the identity of each individual for which information is supplied under this section is kept confidential, except as otherwise required by law (including regulation).

(c) Information to be included in reports

In preparing the report, the Commissioner shall annually collect and include in the report information based on the information submitted by States in accordance with section 721(a)(10) of this title, including information on administrative costs as required by section 721(a)(10)(D) of this title. The Commissioner shall, to the maximum extent appropriate, include in the report all information that is required to be submitted in the reports described in section 2871(d) of this title and that pertains to the employment of individuals with disabilities

29 USC § 711

§ 711. Evaluation

(a) Statement of purpose; standards; persons eligible to conduct evaluations

For the purpose of improving program management and effectiveness, the Secretary, in consultation with the Commissioner, shall evaluate all the programs authorized by this chapter, their general effectiveness in relation to their cost, their impact on related programs, and their structure and mechanisms for delivery of services, using appropriate methodology and evaluative research designs. The Secretary shall establish and use standards for the evaluations required by this subsection. Such an evaluation shall be conducted by a person not immediately involved in the administration of the program evaluated.

(b) Opinions of program and project participants

In carrying out evaluations under this section, the Secretary shall obtain the opinions of program and project participants about the strengths and weaknesses of the programs and projects.

(c) Data as property of United States

The Secretary shall take the necessary action to assure that all studies, evaluations, proposals, and data produced or developed with Federal funds under this chapter shall become the property of the United States.

(d) Information from other departments and agencies

Such information as the Secretary may determine to be necessary for purposes of the evaluations conducted under this section shall be made available upon request of the Secretary, by the departmentsand agencies of the executive branch.

(e) Longitudinal study

(1) To assess the linkages between vocational rehabilitation services and economic and noneconomic outcomes, the Secretary continue to conduct a longitudinal study of a national sample of applicants for the services.

(2) The study shall address factors related to attrition and completion of the program through which the services are provided and factors within and outside the program affecting results. Appropriate comparisons shall be used to contrast the experiences of similar persons who do not obtain the services.

(3) The study shall be planned to cover the period beginning on the application of individuals with disabilities for the services, through the eligibility determination and provision of services for the individuals, and a further period of not less than 2 years after the termination of services.

(f) Information on exemplary practices

(1) The Commissioner shall identify and disseminate information on exemplary practices concerning vocational rehabilitation.

(2) To facilitate compliance with paragraph (1), the Commissioner shall conduct studies and analyses that identify exemplary practices concerning vocational

rehabilitation, including studies in areas relating to providing informed choice in the rehabilitation process, promoting consumer satisfaction, promoting job placement and retention, providing supported employment, providing services to particular disability populations, financing personal assistance services, providing assistive technology devices and assistive technology services, entering into cooperative agreements, establishing standards and certification for community rehabilitation programs, converting from nonintegrated to integrated employment, and providing caseload management.

(g) Authorization of appropriations

There are authorized to be appropriated to carry out this section such sums as may be necessary.

29 USC § 712

§ 712. Information clearinghouse

(a) Establishment; information and resources for individuals with disabilities

The Secretary shall establish a central clearinghouse for information and resource availability for individuals with disabilities which shall provide information and data regarding -

(1) the location, provision, and availability of services and programs for individuals with disabilities, including such information and data provided by State workforce investment boards regarding such services and programs authorized under title I of such Act;

(2) research and recent medical and scientific developments bearing on disabilities (and their prevention, amelioration, causes, and cures); and

(3) the current numbers of individuals with disabilities and their needs.

The clearinghouse shall also provide any other relevant information and data which the Secretary considers appropriate.

(b) Information and data retrieval system

The Commissioner may assist the Secretary to develop within the Department of Education a coordinated system of information and data retrieval, which will have the capacity and responsibility to provide information regarding the information and data referred to in subsection (a) of this section to the Congress, public and private agencies and organizations, individuals with disabilities and their families, professionals in fields serving such individuals, and the general public.

(c) Office of Information and Resources for Individuals with Disabilities

The office established to carry out the provisions of this section shall be known as the "Office of Information and Resources for Individuals with Disabilities".

(d) Authorization of appropriations

There are authorized to be appropriated to carry out this section such sums as may be necessary.

29 USC § 713

§ 713. Transfer of funds

(a) Except as provided in subsection (b) of this section, no funds appropriated under this chapter for any program or activity may be used for any purpose other than that for which the funds were specifically authorized.

(b) No more than 1 percent of funds appropriated for discretionary grants, contracts, or cooperative agreements authorized by this chapter may be used for the purpose of providing non-Federal panels of experts to review applications for such grants, contracts, or cooperative agreements.

29 USC § 714

§ 714. State administration

The application of any State rule or policy relating to the administration or operation of programs funded by this chapter (including any rule or policy based on State interpretation of any Federal law, regulation, or guideline) shall be identified as a State imposed requirement.

29 USC § 715

§ 715. Review of applications

Applications for grants in excess of $100,000 in the aggregate authorized to be funded under this chapter, other than grants primarily for the purpose of conducting dissemination or conferences, shall be reviewed by panels of experts which shall include a majority of non-Federal members. Non-Federal members may be provided travel, per diem, and consultant fees not to exceed the daily equivalent of the rate of pay for level 4 of the Senior Executive Service Schedule under section 5382 of title 5.

29 USC § 716

§ 716. Carryover

(a) In general

Except as provided in subsection (b) of this section, and notwithstanding any other provision of law -

(1) any funds appropriated for a fiscal year to carry out any grant program under part B of subchapter I of this chapter, section 794e of this title (except as provided in section 794e(b) of this title), part B of subchapter VI of this chapter, subpart 2 or 3 of part A of subchapter VII of this chapter, or part B of subchapter VII of this chapter (except as provided in section 796k(b) of this title), including any funds reallotted under any such grant program, that are not obligated and expended by recipients prior to the beginning of the succeeding fiscal year; or

(2) any amounts of program income, including reimbursement payments under the Social Security Act (42 U.S.C. 301 et seq.), received by recipients under any grant program specified in paragraph (1) that are not obligated and expended by recipients prior to the beginning of the fiscal year succeeding the fiscal year in which such amounts were received, shall remain available for obligation and expenditure by such recipients during such succeeding fiscal year.

(b) Non-Federal share

Such funds shall remain available for obligation and expenditure by a recipient as provided in subsection (a) of this section only to the extent that the recipient complied with any Federal share requirements applicable to the program for the fiscal year for which the funds were appropriated.

29 USC § 717

§ 717. Client assistance information

All programs, including community rehabilitation programs, and projects, that provide services to individuals with disabilities under this chapter shall advise such individuals who are applicants for or recipients of the services, or the applicants' representatives or individuals' representatives, of the availability and purposes of the client assistance program under section 732 of this title, including information on means of seeking assistance under such program.

29 USC § 718

§ 718. Traditionally underserved populations

(a) Findings

With respect to the programs authorized in subchapters II through VII of this chapter, the Congress finds as follows:

(1) Racial profile

The racial profile of America is rapidly changing. While the rate of increase for white Americans is 3.2 percent, the rate of increase for racial and ethnic minorities is much higher: 38.6 percent for Latinos, 14.6 percent for African-Americans, and 40.1 percent for Asian-Americans and other ethnic groups. By the year 2000, the Nation will have 260,000,000 people, one of every three of whom will be either African-American, Latino, or Asian- American.

(2) Rate of disability

Ethnic and racial minorities tend to have disabling conditions at a disproportionately high rate. The rate of work-related disability for American Indians is about one and one-half times that of the general population. African-Americans are also one and one-half times more likely to be disabled than whites and twice as likely to be significantly disabled.

(3) Inequitable treatment

Patterns of inequitable treatment of minorities have been documented in all major junctures of the vocational rehabilitation process. As compared to white Americans, a larger percentage of African-American applicants to the vocational rehabilitation system is denied acceptance. Of applicants accepted for service, a larger percentage of African-American cases is closed without being rehabilitated. Minorities are provided less training than their white counterparts. Consistently, less money is spent on minorities than on their white counterparts.

(4) Recruitment

Recruitment efforts within vocational rehabilitation at the level of preservice training, continuing education, and in-service training must focus on bringing larger numbers of minorities into the profession in order to provide appropriate practitioner knowledge, role models, and sufficient manpower to address the clearly changing demography of vocational rehabilitation.

(b) Outreach to minorities

(1) In general

For each fiscal year, the Commissioner and the Director of the National Institute on Disability and Rehabilitation Research (referred to in this subsection as the "Director") shall reserve 1 percent of the funds appropriated for the fiscal year for programs authorized under subchapters II, III, VI, and VII of this chapter to carry out this subsection. The Commissioner and the Director shall use the reserved funds to carry out one or more of the activities described in paragraph (2) through a grant, contract, or cooperative agreement.

(2) Activities

The activities carried out by the Commissioner and the Director shall include one or more of the following:

(A) Making awards to minority entities and Indian tribes to carry out activities under the programs authorized under subchapters II, III, VI, and VII of this chapter.

(B) Making awards to minority entities and Indian tribes to conduct research, training, technical assistance, or a related activity, to improve services provided under this chapter, especially services provided to individuals from minority backgrounds.

(C) Making awards to entities described in paragraph (3) to provide outreach and technical assistance to minority entities and Indian tribes to promote their participation in activities funded under this chapter, including assistance to enhance their capacity to carry out such activities.

(3) Eligibility

To be eligible to receive an award under paragraph (2)(C), an entity shall be a State or a public or private nonprofit agency or organization, such as an institution of higher education or an Indian tribe.

(4) Report

In each fiscal year, the Commissioner and the Director shall prepare and submit to Congress a report that describes the activities funded under this subsection for the preceding fiscal year.

(5) Definitions

In this subsection:

(A) Historically Black college or university

The term "historically Black college or university" means a part B institution, as defined in section 1061(2) of title 20.

(B) Minority entity

The term "minority entity" means an entity that is a historically Black college or university, a Hispanic-serving institution of higher education, an American Indian tribal college or university, or another institution of higher education whose minority student enrollment is at least 50 percent.

(c) Demonstration

In awarding grants, or entering into contracts or cooperative agreements under subchapters I, II, III, VI, and VII of this chapter, and section 794e of this title, the Commissioner and the Director, in appropriate cases, shall require applicants to demonstrate how the applicants will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds.

SUBCHAPTER I
VOCATIONAL REHABILITATION SERVICES

PART A - GENERAL PROVISIONS

29 USC § 720

§ 720. Declaration of policy; authorization of appropriations

(a) Findings; purpose; policy

(1) Findings

Congress finds that -

(A) work -

(i) is a valued activity, both for individuals and society; and

(ii) fulfills the need of an individual to be productive, promotes independence, enhances self-esteem, and allows for participation in the mainstream of life in the United States;

(B) as a group, individuals with disabilities experience staggering levels of unemployment and poverty;

(C) individuals with disabilities, including individuals with the most significant disabilities, have demonstrated their ability to achieve gainful employment in integrated settings if appropriate services and supports are provided;

(D) reasons for significant numbers of individuals with disabilities not working, or working at levels not commensurate with their abilities and capabilities, include -

(i) discrimination;

(ii) lack of accessible and available transportation;

(iii) fear of losing health coverage under the medicare and medicaid programs carried out under titles XVIII and XIX of the Social Security Act (42 U.S.C. 1395 et seq. and 1396 et seq.) or fear of losing private health insurance; and

(iv) lack of education, training, and supports to meet job qualification standards necessary to secure, retain, regain, or advance in employment;

(E) enforcement of subchapter V of this chapter and of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) holds the promise of ending discrimination for individuals with disabilities;

(F) the provision of workforce investment activities and vocational rehabilitation services can enable individuals with disabilities, including individuals with the most significant disabilities, to pursue meaningful careers by securing gainful employment commensurate with their abilities and capabilities; and

(G) linkages between the vocational rehabilitation programs established under this subchapter and other components of the statewide workforce investment systems are critical to ensure effective and meaningful participation by individuals with disabilities in workforce investment activities.

(2) Purpose

The purpose of this subchapter is to assist States in operating statewide comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation, each of which is -

(A) an integral part of a statewide workforce investment system; and

(B) designed to assess, plan, develop, and provide vocational rehabilitation services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that such individuals may prepare for and engage in gainful employment.

(3) Policy

It is the policy of the United States that such a program shall be carried out in a manner consistent with the following principles:

(A) Individuals with disabilities, including individuals with the most significant disabilities, are generally presumed to be capable of engaging in gainful employment and the provision of individualized vocational rehabilitation services can improve their ability to become gainfully employed.

(B) Individuals with disabilities must be provided the opportunities to obtain gainful employment in integrated settings.

(C) Individuals who are applicants for such programs or eligible to participate in such programs must be active and full partners in the vocational rehabilitation process, making meaningful and informed choices -

(i) during assessments for determining eligibility and vocational rehabilitation needs; and

(ii) in the selection of employment outcomes for the individuals, services needed to achieve the outcomes, entities providing such services, and the methods used to secure such services.

(D) Families and other natural supports can play important roles in the success of a vocational rehabilitation program, if the individual with a disability involved requests, desires, or needs such supports.

(E) Vocational rehabilitation counselors that are trained and prepared in accordance with State policies and procedures as described in section 721(a)(7)(B) of this title (referred to individually in this subchapter as a "qualified vocational rehabilitation counselor"), other qualified rehabilitation personnel, and other qualified personnel facilitate the accomplishment of the employment outcomes and objectives of an individual.

(F) Individuals with disabilities and the individuals' representatives are full partners in a vocational rehabilitation program and must be involved on a regular basis and in a meaningful manner with respect to policy development and implementation.

(G) Accountability measures must facilitate the accomplishment of the goals and objectives of the program, including providing vocational rehabilitation services to, among others, individuals with the most significant disabilities.

(b) Authorization of appropriations

(1) In general

For the purpose of making grants to States under part B of this subchapter to assist States in meeting the costs of vocational rehabilitation services provided in accordance with State plans under section 721 of this title, there are authorized to be appropriated such sums as may be necessary for fiscal years 1999 through 2003, except that the amount to be appropriated for a fiscal year shall not be less than the amount of the appropriation under this paragraph for the immediately preceding fiscal year, increased by the percentage change in the Consumer Price Index determined under subsection (c) of this section for the immediately preceding fiscal year.

(2) Reference

The reference in paragraph (1) to grants to States under part B of this subchapter shall not be considered to refer to grants under section 732 of this title.

(c) Consumer Price Index

(1) Percentage change

No later than November 15 of each fiscal year (beginning with fiscal year 1979), the Secretary of Labor shall publish in the Federal Register the percentage change in the Consumer Price Index published for October of the preceding fiscal year and October of the fiscal year in which such publication is made.

(2) Application

(A) Increase

If in any fiscal year the percentage change published under paragraph (1) indicates an increase in the Consumer Price Index, then the amount to be appropriated under subsection

(b)(1) of this section for the subsequent fiscal year shall be at least the amount appropriated under subsection (b)(1) of this section for the fiscal year in which the publication is made under paragraph (1) increased by such percentage change.

(B) No increase or decrease

If in any fiscal year the percentage change published under paragraph (1) does not indicate an increase in the Consumer Price Index, then the amount to be appropriated under subsection (b)(1) of this section for the subsequent fiscal year shall be at least the amount appropriated under subsection (b)(1) of this section for the fiscal year in which the publication is made under paragraph (1).

(3) Definition

For purposes of this section, the term "Consumer Price Index" means the Consumer Price Index for All Urban Consumers, published monthly by the Bureau of Labor Statistics.

(d) Extension

(1) In general

(A) Authorization or duration of program

Unless the Congress in the regular session which ends prior to the beginning of the terminal fiscal year -

(i) of the authorization of appropriations for the program authorized by the State grant program under part B of this subchapter; or

(ii) of the duration of the program authorized by the State grant program under part B of this subchapter; has passed legislation which would have the effect of extending the authorization or duration (as the case may be) of such program, such authorization or duration is automatically extended for 1 additional year for the program authorized by this subchapter.

(B) Calculation

The amount authorized to be appropriated for the additional fiscal year described in subparagraph (A) shall be an amount equal to the amount appropriated for such program for fiscal year 2003, increased by the percentage change in the Consumer Price Index determined under subsection (c) of this section for the immediately preceding fiscal year, if the percentage change indicates an increase.

(2) Construction

(A) Passage of legislation

For the purposes of paragraph (1)(A), Congress shall not be deemed to have passed legislation unless such legislation becomes law.

(B) Acts or determinations of Commissioner

In any case where the Commissioner is required under an applicable statute to carry out certain acts or make certain determinations which are necessary for the continuation of the program authorized by this subchapter, if such acts or determinations are required during the terminal year of such program, such acts and determinations shall be required during any fiscal year in which the extension described in that part of paragraph (1) that follows clause (ii) of paragraph (1)(A) is in effect.

29 USC § 721

§ 721. State plans

(a) Plan requirements

(1) In general

(A) Submission

To be eligible to participate in programs under this subchapter, a State shall submit to the Commissioner a State plan for vocational rehabilitation services that meets the requirements of this section, on the same date that the State submits a State plan under section 112 of the Workforce Investment Act of 1998 [29 U.S.C. 2822].

(B) Nonduplication

The State shall not be required to submit, in the State plan for vocational rehabilitation services, policies, procedures, or descriptions required under this subchapter that have been previously submitted to the Commissioner and that demonstrate that such State meets the requirements of this subchapter, including any policies, procedures, or descriptions submitted under this subchapter as in effect on the day before August 7, 1998.

(C) Duration

The State plan shall remain in effect subject to the submission of such modifications as the State determines to be necessary or as the Commissioner may require based on a change in State policy, a change in Federal law (including regulations), an interpretation of this chapter by a Federal court or the highest court of the State, or a finding by the Commissioner of State noncompliance with the requirements of this chapter, until the State submits and receives approval of a new State plan.

(2) Designated State agency; designated State unit

(A) Designated State agency

The State plan shall designate a State agency as the sole State agency to administer the plan, or to supervise the administration of the plan by a local agency, except that -

(i) where, under State law, the State agency for individuals who are blind or another agency that provides assistance or services to adults who are blind is authorized to provide vocational rehabilitation services to individuals who are blind, that agency may be designated as the sole State agency to administer the part of the plan under which vocational rehabilitation services are provided for individuals who are blind (or to supervise the administration of such part by a local agency) and a separate State agency may be designated as the sole State agency to administer or supervise the administration of the rest of the State plan;

(ii) the Commissioner, on the request of a State, may authorize the designated State agency to share funding and administrative responsibility with another agency of the State or with a local agency in order to permit the agencies to carry out a joint program to provide services to individuals with disabilities, and may waive compliance, with respect to vocational rehabilitation services furnished under the joint program, with the requirement of paragraph (4) that the plan be in effect in all political subdivisions of the State; and

(iii) in the case of American Samoa, the appropriate State agency shall be the Governor of American Samoa.

(B) Designated State unit

The State agency designated under subparagraph (A) shall be -

(i) a State agency primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities; or

(ii) if not such an agency, the State agency (or each State agency if 2 are so designated) shall include a vocational rehabilitation bureau, division, or other organizational unit that -

(I) is primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities, and is responsible for the vocational rehabilitation program of the designated State agency;

(II) has a full-time director;

(III) has a staff employed on the rehabilitation work of the organizational unit all or substantially all of whom are employed full time on such work; and

(IV) is located at an organizational level and has an organizational status within the designated State agency comparable to that of other major organizational units of the designated State agency.

(C) Responsibility for services for the blind

If the State has designated only 1 State agency pursuant to subparagraph (A), the State may assign responsibility for the part of the plan under which vocational rehabilitation services are provided for individuals who are blind to an organizational unit of the designated State agency and assign responsibility for the rest of the plan to another organizational unit of the designated State agency, with the provisions of subparagraph (B) applying separately to each of the designated State units.

(3) Non-Federal share

The State plan shall provide for financial participation by the State, or if the State so elects, by the State and local agencies, to provide the amount of the non-Federal share of he cost of carrying out part B of this subchapter.

(4) Statewideness

The State plan shall provide that the plan shall be in effect in all political subdivisions of the State, except that -

(A) in the case of any activity that, in the judgment of the Commissioner, is likely to assist in promoting the vocational rehabilitation of substantially larger numbers of individuals with disabilities or groups of individuals with disabilities, the Commissioner may waive compliance with the requirement that the plan be in effect in all political subdivisions of the State to the extent and for such period as may be provided in accordance with regulations prescribed by the Commissioner, but only if the non-Federal share of the cost of the vocational rehabilitation services involved is met from funds made available by a local agency (including funds contributed to such agency by a private agency, organization, or individual); and

(B) in a case in which earmarked funds are used toward the non-Federal share and such funds are earmarked for particular geographic areas within the State, the earmarked funds may be used in such areas if the State notifies the Commissioner that the State cannot provide the full non-Federal share without such funds.

(5) Order of selection for vocational rehabilitation services

In the event that vocational rehabilitation services cannot be provided to all eligible individuals with disabilities in the State who apply for the services, the State plan shall -

(A) show the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services;

(B) provide the justification for the order of selection;

(C) include an assurance that, in accordance with criteria established by the State for the order of selection, individuals with the most significant disabilities will be selected first for the provision of vocational rehabilitation services; and

(D) provide that eligible individuals, who do not meet the order of selection criteria, shall have access to services provided through the information and referral system implemented under paragraph (20).

(6) Methods for administration

(A) In general

The State plan shall provide for such methods of administration as are found by the Commissioner to be necessary for the proper and efficient administration of the plan.

(B) Employment of individuals with disabilities

The State plan shall provide that the designated State agency, and entities carrying out community rehabilitation programs in the State, who are in receipt of assistance under this subchapter shall take affirmative action to employ and advance in employment qualified individuals with disabilities covered under, and on the same terms and conditions as set forth in, section 793 of this title.

(C) Facilities

The State plan shall provide that facilities used in State plan shall comply with the Act entitled "An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", approved on August 12, 1968 (commonly known as the "Architectural Barriers Act of 1968") [42 U.S.C. 4151 et seq.], with section 794 of this title, and with the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.].

(7) Comprehensive system of personnel development

The State plan shall –

(A) include a description (consistent with the purposes of this chapter) of a comprehensive system of personnel development, which shall include -

(i) a description of the procedures and activities the designated State agency will undertake to ensure an adequate supply of qualified State rehabilitation professionals and paraprofessionals for the designated State unit, including the development and maintenance of a system for determining, on an annual basis -

(I) the number and type of personnel that are employed by the designated State unit in the provision of vocational rehabilitation services, including ratios of qualified vocational rehabilitation counselors to clients; and

(II) the number and type of personnel needed by the State, and a projection of the numbers of such personnel that will be needed in 5 years, based on projections of the number of individuals to be served, the number of such personnel who are expected to retire or leave the vocational rehabilitation field, and other relevant factors;

(ii) where appropriate, a description of the manner in which activities will be undertaken under this section to coordinate the system of personnel development with personnel development activities under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.);

(iii) a description of the development and maintenance of a system of determining, on an annual basis, information on the programs of institutions of higher education within the State that are preparing rehabilitation professionals, including -

(I) the numbers of students enrolled in such programs; and

(II) the number of such students who graduated with certification or licensure, or with credentials to qualify for certification or licensure, as a rehabilitation professional during the past year;

(iv) a description of the development, updating, and implementation of a plan that -

(I) will address the current and projected vocational rehabilitation services personnel training needs for the designated State unit; and

(II) provides for the coordination and facilitation of efforts between the designated State unit, institutions of higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel who are individuals with disabilities; and

(v) a description of the procedures and activities the designated State agency will undertake to ensure that all personnel employed by the designated State unit are appropriately and adequately trained and prepared, including -

(I) a system for the continuing education of rehabilitation professionals and paraprofessionals within the designated State unit, particularly with respect to rehabilitation technology; and

(II) procedures for acquiring and disseminating to rehabilitation professionals and paraprofessionals within the designated State unit, significant knowledge from research and other sources, including procedures for providing training regarding the amendments to this chapter made by the Rehabilitation Act Amendments of 1998;

(B) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel, including rehabilitation professionals and paraprofessionals, needed within the designated State unit to carry out this part are appropriately and adequately prepared and trained, including -

(i) the establishment and maintenance of standards that are consistent with any national or State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which such personnel are providing vocational rehabilitation services; and

(ii) to the extent that such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel within the designated State unit that meet appropriate professional requirements in the State; and

(C) contain provisions relating to the establishment and maintenance of minimum standards to ensure the availability of personnel within the designated State unit, to the maximum extent feasible, trained to communicate in the native language or mode of communication of an applicant or eligible individual.

(8) Comparable services and benefits

(A) Determination of availability

(i) In general

The State plan shall include an assurance that, prior to providing any vocational rehabilitation service to an eligible individual, except those services specified in paragraph (5)(D) and in paragraphs (1) through (4) and (14) of section 723(a) of this title, the designated State unit will determine whether comparable services and benefits are available under any other program (other than a program carried out under this subchapter) unless such a determination would interrupt or delay -

(I) the progress of the individual toward achieving the employment outcome identified in the individualized plan for employment of the individual in accordance with section 722(b) of this title;

(II) an immediate job placement; or

(III) the provision of such service to any individual at extreme medical risk.

(ii) Awards and scholarships

For purposes of clause (i), comparable benefits do not include awards and scholarships based on merit.

(B) Interagency agreement

The State plan shall include an assurance that the Governor of the State, in consultation with the entity in the State responsible for the vocational rehabilitation program and other appropriate agencies, will ensure that an interagency agreement or other mechanism for interagency coordination takes effect between any appropriate public entity, including the State entity responsible for administering the State' medicaid program, a public institution of higher education, and a component of the statewide workforce investment system, and the designated State unit, in order to ensure the provision of vocational rehabilitation services described in subparagraph

(A) (other than those services specified in paragraph (5)(D and in paragraphs (1) through (4) and (14) of section 723(a) of this title), that are included in the individualized plan for employment of an eligible individual, including the provision of such vocational rehabilitation services during the pendency of any dispute described in clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a description of a method for defining, the financial responsibility of such public entity for providing such services, and a provision stating the financial responsibility of such public entity for providing such services.

(ii) Conditions, terms, and procedures of reimbursement

Information specifying the conditions, terms, and procedures under which a designated State unit shall be reimbursed by other public entities for providing such services, based on the provisions of such agreement or mechanism.

(iii) Interagency disputes

Information specifying procedures for resolving interagency disputes under the agreement or other mechanism (including procedures under which the designated State unit may initiate proceedings to secure reimbursement from other public entities or otherwise implement the provisions of the agreement or mechanism).

(iv) Coordination of services procedures

Information specifying policies and procedures for public entities to determine and identify the interagency coordination responsibilities of each public entity to promote the coordination and timely delivery of vocational rehabilitation services (except those services specified in paragraph (5)(D) and in paragraphs (1) through (4) and (14) of section 723(a) of this title).

(C) Responsibilities of other public entities

(i) Responsibilities under other law

Notwithstanding subparagraph (B), if any public entity other than a designated State unit is obligated under Federal or State law, or assigned responsibility under State policy or under this paragraph, to provide or pay for any services that are also considered to be vocational rehabilitation services (other than those specified in paragraph (5)(D) and in paragraphs (1) through (4) and (14) of section 723(a) of this title), such public entity shall fulfill that obligation or responsibility, either directly or by contract or other arrangement.

(ii) Reimbursement

If a public entity other than the designated State unit fails to provide or pay for the services described in clause (i) for an eligible individual, the designated State unit shall provide or pay for such services to the individual. Such designated State unit may claim reimbursement for the services from the public entity that failed to provide or pay for such services. Such public entity shall reimburse the designated State unit pursuant to the terms of the interagency agreement or other mechanism described in this paragraph according to the procedures established in such agreement or mechanism pursuant to subparagraph (B)(ii).

(D) Methods

The Governor of a State may meet the requirements of subparagraph (B) through -

(i) a State statute or regulation;

(ii) a signed agreement between the respective officials of the public entities that clearly identifies the responsibilities of each public entity relating to the provision of services; or

(iii) another appropriate method, as determined by the designated State unit.

(9) Individualized plan for employment

(A) Development and implementation

The State plan shall include an assurance that an individualized plan for employment meeting the requirements of section 722(b) of this title will be developed and implemented in a timely manner for an individual subsequent to the determination of the eligibility of the individual for services under this subchapter, except that in a State operating under an order of selection described in paragraph (5), the plan will be developed and implemented only for individuals meeting the order of selection criteria of the State.

(B) Provision of services

The State plan shall include an assurance that such services will be provided in accordance with the provisions of the individualized plan for employment.

(10) Reporting requirements

(A) In general

The State plan shall include an assurance that the designated State agency will submit reports in the form and level of detail and at the time required by the Commissioner regarding applicants for, and eligible individuals receiving, services under this subchapter.

(B) Annual reporting

In specifying the information to be submitted in the reports, the Commissioner shall require annual reporting on the eligible individuals receiving the services, on those specific data elements described in section 136(d)(2) of the Workforce Investment Act of 1998 [29 U.S.C. 2871(d)(2)] that are determined by the Secretary to be relevant in assessing the performance of designated State units in carrying out the vocational rehabilitation program established under this subchapter.

(C) Additional data

In specifying the information required to be submitted in the reports, the Commissioner shall require additional data with regard to applicants and eligible individuals related to -

(i) the number of applicants and the number of individuals determined to be eligible or ineligible for the program carried out under this subchapter, including -

(I) the number of individuals determined to be ineligible because they did not require vocational rehabilitation services, as provided in section 722(a) of this title; and

(II) the number of individuals determined, on the basis of clear and convincing evidence, to be too severely disabled to benefit in terms of an employment outcome from vocational rehabilitation services;

(ii) the number of individuals who received vocational rehabilitation services through the program, including -

(I) the number who received services under paragraph (5)(D), but not assistance under an individualized plan for employment;

(II) of those recipients who are individuals with significant disabilities, the number who received assistance under an individualized plan for employment consistent with section 722(b) of this title; and

(III) of those recipients who are not individuals with significant disabilities, the number who received assistance under an individualized plan for employment consistent with section 722(b) of this title;

(iii) of those applicants and eligible recipients who are individuals with significant disabilities -

(I) the number who ended their participation in the program carried out under this subchapter and the number who achieved employment outcomes after receiving vocational rehabilitation services; and

(II) the number who ended their participation in the program and who were employed 6 months and 12 months after securing or regaining employment, or, in the case of individuals whose employment outcome was to retain or advance in employment, who were employed 6 months and 12 months after achieving their employment outcome, including -

(aa) the number who earned the minimum wage rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or another wage level set by the Commissioner, during such employment; and

(bb) the number who received employment benefits from an employer during such employment; and

(iv) of those applicants and eligible recipients who are not individuals with significant disabilities -

(I) the number who ended their participation in the program carried out under this subchapter and the number who achieved employment outcomes after receiving vocational rehabilitation services; and

(II) the number who ended their participation in the program and who were employed 6 months and 12 months after securing or regaining employment, or, in the case of individuals whose employment outcome was to retain or advance in employment, who were employed 6 months and 12 months after achieving their employment outcome, including -

(aa) the number who earned the minimum wage rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or another wage level set by the Commissioner, during such employment; and

(bb) the number who received employment benefits from an employer during such employment.

(D) Costs and results

The Commissioner shall also require that the designated State agency include in the reports information on -

(i) the costs under this subchapter of conducting administration, providing assessment services, counseling and guidance, and other direct services provided by designated State agency staff, providing services purchased under individualized plans for employment, supporting small business enterprises, establishing, developing, and improving community rehabilitation programs, providing other services to groups, and facilitating use of other programs under this chapter and title I of the Workforce Investment Act of 1998 [29 U.S.C. 2801 et seq.] by eligible individuals; and

(ii) the results of annual evaluation by the State of program effectiveness under paragraph (15)(E).

(E) Additional information

The Commissioner shall require that each designated State unit include in the reports additional information related to the applicants and eligible individuals, obtained either through a complete count or sampling, including -

(i) information on -

(I) age, gender, race, ethnicity, education, category of impairment, severity of disability, and whether the individuals are students with disabilities;

(II) dates of application, determination of eligibility or ineligibility, initiation of the individualized plan for employment, and termination of participation in the program;

(III) earnings at the time of application for the program and termination of participation in the program;

(IV) work status and occupation;

(V) types of services, including assistive technology services and assistive technology devices, provided under the program;

(VI) types of public or private programs or agencies that furnished services under the program; and

(VII) the reasons for individuals terminating participation in the program without achieving an employment outcome; and

(ii) information necessary to determine the success of the State in meeting -

(I) the State performance measures established under section 136(b) of the Workforce Investment Act of 1998 [29 U.S.C. 2871(b)], to the extent the measures are applicable to individuals with disabilities; and

(II) the standards and indicators established pursuant to section 726 of this title.

(F) Completeness and confidentiality

The State plan shall include an assurance that the information submitted in the reports will include a complete count, except as provided in subparagraph (E), of the applicants and eligible individuals, in a manner permitting the greatest possible cross-classification of data and that the identity of each individual for which information is supplied under this paragraph will be kept confidential.

(11) Cooperation, collaboration, and coordination

(A) Cooperative agreements with other components of statewide workforce investment systems

The State plan shall provide that the designated State unit or designated State agency shall enter into a cooperative agreement with other entities that are components of the statewide workforce investment system of the State, regarding the system, which agreement may provide for -

(i) provision of intercomponent staff training and technical assistance with regard to -

(I) the availability and benefits of, and information on eligibility standards for, vocational rehabilitation services; and

(II) the promotion of equal, effective, and meaningful participation by individuals with disabilities in workforce investment activities in the State through the promotion of program accessibility, the use of nondiscriminatory policies and procedures, and the provision of reasonable accommodations, auxiliary aids and services, and rehabilitation technology, for individuals with disabilities;

(ii) use of information and financial management systems that link all components of the statewide workforce investment system, that link the components to other electronic networks, including nonvisual electronic networks, and that relate to such subjects as employment statistics, and information on job vacancies, career planning, and workforce investment activities;

(iii) use of customer service features such as common intake and referral procedures, customer databases, resource information, and human services hotlines;

(iv) establishment of cooperative efforts with employers to -

(I) facilitate job placement; and

(II) carry out any other activities that the designated State unit and the employers determine to be appropriate;

(v) identification of staff roles, responsibilities, and available resources, and specification of the financial responsibility of each component of the statewide workforce investment system with regard to paying for necessary services (consistent with State law and Federal requirements); and

(vi) specification of procedures for resolving disputes among such components.

(B) Replication of cooperative agreements

The State plan shall provide for the replication of such cooperative agreements at the local level between individual offices of the designated State unit and local entities carrying out activities through the statewide workforce investment system.

(C) Interagency cooperation with other agencies

The State plan shall include descriptions of interagency cooperation with, and utilization of the services and facilities of, Federal, State, and local agencies and programs, including programs carried out by the Under Secretary for Rural Development of the Department of Agriculture and State use contracting programs, to the extent that such agencies and programs are not carrying out activities through the statewide workforce investment system.

(D) Coordination with education officials

The State plan shall contain plans, policies, and procedures for coordination between the designated State agency and education officials responsible for the public education of students with disabilities, that are designed to facilitate the transition of the students with disabilities from the receipt of educational services in school to the receipt of vocational rehabilitation services under this subchapter, including information on a formal interagency agreement with the State educational agency that, at a minimum, provides for -

(i) consultation and technical assistance to assist educational agencies in planning for the transition of students with disabilities from school to post-school activities, including vocational rehabilitation services;

(ii) transition planning by personnel of the designated State agency and educational agency personnel for students with disabilities that facilitates the development and completion of their individualized education programs under section 614(d) of the Individuals with Disabilities Education Act [20 U.S.C. 1414(d)];

(iii) the roles and responsibilities, including financial responsibilities, of each agency, including provisions for determining State lead agencies and qualified personnel responsible for transition services; and

(iv) procedures for outreach to and identification of students with disabilities who need the transition services.

(E) Coordination with Statewide Independent Living Councils and independent living centers

The State plan shall include an assurance that the designated State unit, the Statewide Independent Living Council established under section 796d of this title, and the independent living centers described in subpart 3 of part A of subchapter VII of this chapter within the State have developed working relationships and coordinate their activities.

(F) Cooperative agreement with recipients of grants for services to American Indians

In applicable cases, the State plan shall include an assurance that the State has entered into a formal cooperative agreement with each grant recipient in the State that receives funds under part C of this subchapter. The agreement shall describe strategies for collaboration and coordination in providing vocational rehabilitation services to American Indians who are individuals with disabilities, including -

(i) strategies for interagency referral and information sharing that will assist in eligibility determinations and the development of individualized plans for employment;

(ii) procedures for ensuring that American Indians who are individuals with disabilities and are living near a reservation or tribal service area are provided vocational rehabilitation services; and

(iii) provisions for sharing resources in cooperative studies and assessments, joint training activities, and other collaborative activities designed to improve the provision of services to American Indians who are individuals with disabilities.

(12) Residency

The State plan shall include an assurance that the State will not impose a residence requirement that excludes from services provided under the plan any individual who is present in the State.

(13) Services to American Indians

The State plan shall include an assurance that, except as otherwise provided in part C of this subchapter, the designated State agency will provide vocational rehabilitation services to American Indians who are individuals with disabilities residing in the State to the same extent as the designated State agency provides such services to other significant populations of individuals with disabilities residing in the State.

(14) Annual review of individuals in extended employment or other employment under special certificate provisions of the Fair Labor Standards Act of 1938

The State plan shall provide for -

(A) an annual review and reevaluation of the status of each individual with a disability served under this subchapter who has achieved an employment outcome either in an extended employment setting in a community rehabilitation program or any other employment under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)) for 2 years after the achievement of the outcome (and thereafter if requested by the individual or, if appropriate, the individual's representative), to determine the interests, priorities, and needs of the individual with respect to competitive employment or training for competitive employment;

(B) input into the review and reevaluation, and a signed acknowledgment that such review and reevaluation have been conducted, by the individual with a disability, or, if appropriate, the individual's representative; and

(C) maximum efforts, including the identification and provision of vocational rehabilitation services, reasonable accommodations, and other necessary support services, to assist the individuals described in subparagraph (A) in engaging in competitive employment.

(15) Annual State goals and reports of progress

(A) Assessments and estimates

The State plan shall -

(i) include the results of a comprehensive, statewide assessment, jointly conducted by the designated State unit and the State Rehabilitation Council (if the State has such a Council) every 3 years, describing the rehabilitation needs of individuals with disabilities residing within the State, particularly the vocational rehabilitation services needs of -

(I) individuals with the most significant disabilities, including their need for supported employment services;

(II) individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program carried out under this subchapter; and

(III) individuals with disabilities served through other components of the statewide workforce investment system (other than the vocational rehabilitation program), as identified by such individuals and personnel assisting such individuals through the components;

(ii) include an assessment of the need to establish, develop, or improve community rehabilitation programs within the State; and

(iii) provide that the State shall submit to the Commissioner a report containing information regarding updates to the assessments, for any year in which the State updates the assessments.

(B) Annual estimates

The State plan shall include, and shall provide that the State shall annually submit a report to the Commissioner that includes, State estimates of -

(i) the number of individuals in the State who are eligible for services under this subchapter;

(ii) the number of such individuals who will receive services provided with funds provided under part B of this subchapter and under part B of subchapter VI of this chapter, including, if the designated State agency uses an order of selection in accordance with paragraph (5), estimates of the number of individuals to be served under each priority category within the order; and

(iii) the costs of the services described in clause (i), including, if the designated State agency uses an order of selection in accordance with paragraph (5), the service costs for each priority category within the order.

(C) Goals and priorities

(i) In general

The State plan shall identify the goals and priorities of the State in carrying out the program. The goals and priorities shall be jointly developed, agreed to, and reviewed annually by the designated State unit and the State Rehabilitation Council, if the State has such a Council. Any revisions to the goals and priorities shall be jointly agreed to by the designated State unit and the State Rehabilitation Council, if the State has such a Council. The State plan shall provide that the State shall submit to the Commissioner a report containing information regarding revisions in the goals and priorities, for any year in which the State revises the goals and priorities.

(ii) Basis

The State goals and priorities shall be based on an analysis of -

(I) the comprehensive assessment described in subparagraph (A), including any updates to the assessment;

(II) the performance of the State on the standards and indicators established under section 726 of this title; and

(III) other available information on the operation and the effectiveness of the vocational rehabilitation program carried out in the State, including any reports received from the State Rehabilitation Council, under section 725(c) of this title and the findings and recommendations from monitoring activities conducted under section 727 of this title.

(iii) Service and outcome goals for categories in order of selection

If the designated State agency uses an order of selection in accordance with paragraph (5), the State shall also identify in the State plan service and outcome goals and the time within which these goals may be achieved for individuals in each priority category within the order.

(D) Strategies

The State plan shall contain a description of the strategies the State will use to address the needs identified in the assessment conducted under subparagraph (A) and achieve the goals and priorities identified in subparagraph (C), including -

(i) the methods to be used to expand and improve services to individuals with disabilities, including how a broad range of assistive technology services and assistive technology devices will be provided to such individuals at each stage of the rehabilitation process and how such services and devices will be provided to such individuals on a statewide basis;

(ii) outreach procedures to identify and serve individuals with disabilities who are minorities and individuals with disabilities who have been unserved or underserved by the vocational rehabilitation program;

(iii) where necessary, the plan of the State for establishing, developing, or improving community rehabilitation programs;

(iv) strategies to improve the performance of the State with respect to the evaluation standards and performance indicators established pursuant to section 726 of this title; and

(v) strategies for assisting entities carrying out other components of the statewide workforce investment system (other than the vocational rehabilitation program) in assisting individuals with disabilities.

(E) Evaluation and reports of progress

The State plan shall -

(i) include the results of an evaluation of the

effectiveness of the vocational rehabilitation program, and a joint report by the designated State unit and the State Rehabilitation Council, if the State has such a Council, to the Commissioner on the progress made in improving the effectiveness from the previous year, which evaluation and report shall include -

(I) an evaluation of the extent to which the goals identified in subparagraph (C) were achieved;

(II) a description of strategies that contributed to achieving the goals;

(III) to the extent to which the goals were not achieved, a description of the factors that impeded that achievement; and

(IV) an assessment of the performance of the State on the standards and indicators established pursuant to section 726 of this title; and

(ii) provide that the designated State unit and the State Rehabilitation Council, if the State has such a Council, shall jointly submit to the Commissioner an annual report that contains the information described in clause (i).

(16) Public comment

The State plan shall -

(A) provide that the designated State agency, prior to the adoption of any policies or procedures governing the provision of vocational rehabilitation services under the State plan (including making any amendment to such policies and procedures), shall conduct public meetings throughout the State, after providing adequate notice of the meetings, to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures, and actively consult with the Director of the client assistance program carried out under section 732 of this title, and, as appropriate, Indian tribes, tribal organizations, and Native Hawaiian organizations on the policies or procedures; and

(B) provide that the designated State agency (or each designated State agency if two agencies are designated) and any sole agency administering the plan in a political subdivision of the State, shall take into account, in connection with matters of general policy arising in the administration of the plan, the views of -

(i) individuals and groups of individuals who are recipients of vocational rehabilitation services, or in appropriate cases, the individuals' representatives;

(ii) personnel working in programs that provide vocational rehabilitation services to individuals with disabilities;

(iii) providers of vocational rehabilitation services to individuals with disabilities;

(iv) the director of the client assistance program; and

(v) the State Rehabilitation Council, if the State has such a Council.

(17) Use of funds for construction of facilities

The State plan shall provide that if, under special circumstances, the State plan includes provisions for the construction of facilities for community rehabilitation programs -

(A) the Federal share of the cost of construction for the facilities for a fiscal year will not exceed an amount equal to 10 percent of the State's allotment under section 730 of this title for such year;

(B) the provisions of section 776 of this title (as in effect on the day before August 7, 1998) shall be applicable to such construction and such provisions shall be deemed to apply to such construction; and

(C) there shall be compliance with regulations the Commissioner shall prescribe designed to assure that no State will reduce its efforts in providing other vocational rehabilitation services (other than for the establishment of facilities for community rehabilitation programs) because the plan includes such provisions for construction.

(18) Innovation and expansion activities

The State plan shall -

(A) include an assurance that the State will reserve and use a portion of the funds allotted to the State under section 730 of this title -

(i) for the development and implementation of innovative approaches to expand and improve the provision of vocational rehabilitation services to individuals with disabilities under this subchapter, particularly individuals with the most significant disabilities, consistent with the findings of the statewide assessment and goals and priorities of the State as described in paragraph (15); and

(ii) to support the funding of -

(I) the State Rehabilitation Council, if the State has such a Council, consistent with the plan prepared under section 725(d)(1) of this title; and

(II) the Statewide Independent Living Council, consistent with the plan prepared under section 796d(e)(1) of this title;

(B) include a description of how the reserved funds will be utilized; and

(C) provide that the State shall submit to the Commissioner an annual report containing a description of how the reserved funds were utilized during the preceding year.

(19) Choice

The State plan shall include an assurance that applicants and eligible individuals or, as appropriate, the applicants' representatives or individuals' representatives, will be provided information and support services to assist the applicants and individuals in exercising informed choice throughout the rehabilitation process, consistent with the provisions of section 722(d) of this title.

(20) Information and referral services

(A) In general

The State plan shall include an assurance that the designated State agency will implement an information and referral system adequate to ensure that individuals with disabilities will be provided accurate vocational rehabilitation information and guidance, using appropriate modes of communication, to assist such individuals in preparing for, securing, retaining, or regaining employment, and will be appropriately referred to Federal and State programs (other than the vocational rehabilitation program carried out under this subchapter), including other components of the statewide workforce investment system in the State.

(B) Referrals

An appropriate referral made through the system shall -

(i) be to the Federal or State programs, including programs carried out by other components of the statewide workforce investment system in the State, best suited to address the specific employment needs of an individual with a disability; and

(ii) include, for each of these programs, provision to the individual of -

(I) a notice of the referral by the designated State agency to the agency carrying out the program;

(II) information identifying a specific point of contact within the agency carrying out the program; and

(III) information and advice regarding the most suitable services to assist the individual to prepare for, secure, retain, or regain employment.

(21) State independent consumer-controlled commission; State Rehabilitation Council

(A) Commission or Council

The State plan shall provide that either -

(i) the designated State agency is an independent commission that -

(I) is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State;

(II) is consumer-controlled by persons who -

(aa) are individuals with physical or mental impairments that substantially limit major life activities; and

(bb) represent individuals with a broad range of disabilities, unless the designated State unit under the direction of the commission is the State agency for individuals who are blind;

(III) includes family members, advocates, or other representatives, of individuals with mental impairments; and

(IV) undertakes the functions set forth in section 725(c)(4) of this title; or

(ii) the State has established a State Rehabilitation Council that meets the criteria set forth in section 725 of this title and the designated State unit -

(I) in accordance with paragraph (15), jointly develops, agrees to, and reviews annually State goals and priorities, and jointly submits annual reports of progress with the Council;

(II) regularly consults with the Council regarding the development, implementation, and revision of State policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services;

(III) includes in the State plan and in any revision to the State plan, a summary of input provided by the Council, including recommendations from the annual report of the Council described in section 725(c)(5) of this title, the review and analysis of consumer satisfaction described in section 725(c)(4) of this title, and other reports prepared by the Council, and the response of the designated State unit to such input and recommendations, including explanations for rejecting any input or recommendation; and

(IV) transmits to the Council -

(aa) all plans, reports, and other information required under this subchapter to be submitted to the Secretary;

(bb) all policies, and information on all practices and procedures, of general applicability provided to or used by rehabilitation personnel in carrying out this subchapter; and

(cc) copies of due process hearing decisions issued under this subchapter, which shall be transmitted in such a manner as to ensure that the identity of the participants in the hearings is kept confidential.

(B) More than one designated State agency

In the case of a State that, under subsection (a)(2) of this section, designates a State agency to administer the part of the State plan under which vocational rehabilitation services are provided for individuals who are blind (or to supervise the administration of such part by a local agency) and designates a separate State agency to administer the rest of the State plan, the State shall either establish a State Rehabilitation Council for each of the two agencies that does not meet the requirements in subparagraph (A)(i), or establish one State Rehabilitation Council for both agencies if neither agency meets the requirements of subparagraph (A)(i).

(22) Supported employment State plan supplement

The State plan shall include an assurance that the State has an acceptable plan for carrying out part B of subchapter VI of this chapter, including the use of funds under that part to supplement funds made available under part B of this subchapter to pay for the cost of services leading to supported employment.

(23) Annual updates

The plan shall include an assurance that the State will submit to the Commissioner reports containing annual updates of the information required under paragraph (7) (relating to a comprehensive system of personnel development) and any other updates of the information required under this section that are requested by the Commissioner, and annual reports as provided in paragraphs (15) (relating to assessments, estimates, goals and priorities, and reports of progress) and (18) (relating to innovation and expansion), at such time and in such manner as the Secretary may determine to be appropriate.

(24) Certain contracts and cooperative agreements

(A) Contracts with for-profit organizations

The State plan shall provide that the designated State agency has the authority to enter into contracts with for-profit organizations for the purpose of providing, as vocational rehabilitation services, on-the-job training and related programs for individuals with disabilities under part A of subchapter VI of this chapter, upon a determination by such agency that such for-profit organizations are better qualified to provide such rehabilitation services than nonprofit agencies and organizations.

(B) Cooperative agreements with private nonprofit organizations

The State plan shall describe the manner in which cooperative agreements with private nonprofit vocational rehabilitation service providers will be established.

(b) Approval; disapproval of the State plan

(1) Approval

The Commissioner shall approve any plan that the Commissioner finds fulfills the conditions specified in this section, and shall disapprove any plan that does not fulfill such conditions.

(2) Disapproval

Prior to disapproval of the State plan, the Commissioner shall notify the State of the intention to disapprove the plan and shall afford the State reasonable notice and opportunity for a hearing.

29 USC § 722

§ 722. Eligibility and individualized plan for employment

(a) Eligibility

(1) Criterion for eligibility

An individual is eligible for assistance under this subchapter if the individual -

(A) is an individual with a disability under section 705(20)(A) of this title; and

(B) requires vocational rehabilitation services to prepare for, secure, retain, or regain employment.

(2) Presumption of benefit

(A) Demonstration

For purposes of this section, an individual shall be presumed to be an individual that can benefit in terms of an employment outcome from vocational rehabilitation services under section 705(20)(A) of this title, unless the designated State unit involved can demonstrate by clear and convincing evidence that such individual is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services du to the severity of the disability of the individual.

(B) Methods

In making the demonstration required under subparagraph (A), the designated State unit shall explore the individual's abilities, capabilities, and capacity to perform in work situations, through the use of trial work experiences, as described in section 705(2)(D) of this title, with appropriate supports provided through the designated State unit, except under limited circumstances when an individual cannot take advantage of such experiences. Such experiences shall be of sufficient variety and over a sufficient period of time to determine the eligibility of the individual or to determine the existence of clear and convincing evidence that the individual is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services due to the severity of the disability of the individual.

(3) Presumption of eligibility

(A) In general

For purposes of this section, an individual who has a disability or is blind as determined pursuant to title II or title XVI of the Social Security Act (42 U.S.C. 401 et seq. and 1381 et seq.) shall be -

(i) considered to be an individual with a significant disability under section 705(21)(A) of this title; and

(ii) presumed to be eligible for vocational rehabilitation services under this subchapter (provided that the individual intends to achieve an employment outcome consistent with the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual) unless the designated State unit involved can demonstrate by clear and convincing evidence that such individual is incapable of benefiting in terms of an employment outcome from vocational rehabilitation services due to the severity of the disability of the individual in accordance with paragraph (2).

(B) Construction

Nothing in this paragraph shall be construed to create an entitlement to any vocational rehabilitation service.

(4) Use of existing information

(A) In general

To the maximum extent appropriate and consistent with the requirements of this part, for purposes of determining the eligibility of an individual for vocational rehabilitation services under this subchapter and developing the individualized plan for employment described in subsection (b) of this section for the individual, the designated State unit shall use information that is existing and current (as of the date of the determination of eligibility or of the development of the individualized plan for employment), including information available from other programs and providers, particularly information used by education officials and the Social Security Administration, information provided by the individual and the family of the individual, and information obtained under the assessment for determining eligibility and vocational rehabilitation needs.

(B) Determinations by officials of other agencies

Determinations made by officials of other agencies, particularly education officials described in section 721(a)(11)(D) of this title, regarding whether an individual satisfies one or more factors relating to whether an individual is an individual with a disability under section 705(20)(A) of this title or an individual with a significant disability under section 705(21)(A) of this title shall be used, to the extent appropriate and consistent with the requirements of this part, in assisting the designated State unit in making such determinations.

(C) Basis

The determination of eligibility for vocational rehabilitation services shall be based on -

(i) the review of existing data described in section 705(2)(A)(i) of this title; and

(ii) to the extent that such data is unavailable or insufficient for determining eligibility, the provision of assessment activities described in section 705(2)(A)(ii) of this title.

(5) Determination of ineligibility

If an individual who applies for services under this subchapter is determined, based on the review of existing data and, to the extent necessary, the assessment activities described in section 705(2)(A)(ii) of this title, not to be eligible for the services, or if an eligible individual receiving services under an individualized plan for employment is determined to be no longer eligible for the services -

(A) the ineligibility determination involved shall be made only after providing an opportunity for full consultation with the individual or, as appropriate, the individual's representative;

(B) the individual or, as appropriate, the individual's representative, shall be informed in writing (supplemented as necessary by other appropriate modes of communication consistent with the informed choice of the individual) of the ineligibility determination, including -

(i) the reasons for the determination; and

(ii) a description of the means by which the individual may express, and seek a remedy for, any dissatisfaction with the determination, including the procedures for review by an impartial hearing officer under subsection (c) of this section;

(C) the individual shall be provided with a description of services available from the client assistance program under section 732 of this title and information on how to contact that program; and

(D) any ineligibility determination that is based on a finding that the individual is incapable of benefiting in terms of an employment outcome shall be reviewed -

(i) within 12 months; and

(ii) thereafter, if such a review is requested by the individual or, if appropriate, by the individual's representative.

(6) Timeframe for making an eligibility determination

The designated State unit shall determine whether an individual is eligible for vocational rehabilitation services under this subchapter within a reasonable period of time, not to exceed 60 days, after the individual has submitted an application for the services unless -

(A) exceptional and unforeseen circumstances beyond the control of the designated State unit preclude making an eligibility determination within 60 days and the designated State unit and the individual agree to a specific extension of time; or

(B) the designated State unit is exploring an individual's abilities, capabilities, and capacity to perform in work situations under paragraph (2)(B).

(b) Development of an individualized plan for employment

(1) Options for developing an individualized plan for employment

If an individual is determined to be eligible for vocational rehabilitation services as described in subsection (a) of this section, the designated State unit shall complete the assessment for determining eligibility and vocational rehabilitation needs, as appropriate, and shall provide the eligible individual or the individual's representative, in writing and in an appropriate mode of communication, with information on the individual's options for developing an individualized plan for employment, including -

(A) information on the availability of assistance, to the extent determined to be appropriate by the eligible individual, from a qualified vocational rehabilitation counselor in developing all or part of the individualized plan for employment for the individual, and the availability of technical assistance in developing all or part of the individualized plan for employment for the individual;

(B) a description of the full range of components that shall be included in an individualized plan for employment;

(C) as appropriate -

(i) an explanation of agency guidelines and criteria associated with financial commitments concerning an individualized plan for employment;

(ii) additional information the eligible individual requests or the designated State unit determines to be necessary; and

(iii) information on the availability of assistance in completing designated State agency forms required in developing an individualized plan for employment; and

(D)(i) a description of the rights and remedies available to such an individual including, if appropriate, recourse to the processes set forth in subsection (c) of this section; and

(ii) a description of the availability of a client assistance program established pursuant to section 732 of this title and information about how to contact the client assistance program.

(2) Mandatory procedures

(A) Written document

An individualized plan for employment shall be a written document prepared on forms provided by the designated State unit.

(B) Informed choice

An individualized plan for employment shall be developed and implemented in a manner that affords eligible individuals the opportunity to exercise informed choice in selecting an employment outcome, the specific vocational rehabilitation services to be provided under the plan, the entity that will provide the vocational rehabilitation services, and the methods used to procure the services, consistent with subsection (d) of this section.

(C) Signatories

An individualized plan for employment shall be -

(i) agreed to, and signed by, such eligible individual or, as appropriate, the individual's representative; and

(ii) approved and signed by a qualified vocational rehabilitation counselor employed by the designated State unit.

(D) Copy

A copy of the individualized plan for employment for an eligible individual shall be provided to the individual or, as appropriate, to the individual's representative, in writing and, if appropriate, in the native language or mode of communication of the individual or, as appropriate, of the individual's representative.

(E) Review and amendment

The individualized plan for employment shall be -

(i) reviewed at least annually by -

(I) a qualified vocational rehabilitation counselor; and

(II) the eligible individual or, as appropriate, the individual's representative; and

(ii) amended, as necessary, by the individual or, as appropriate, the individual's representative, in collaboration with a representative of the designated State agency or a qualified vocational rehabilitation counselor (to the extent determined to be appropriate by the individual), if there are substantive changes in the employment outcome, the vocational rehabilitation services to be provided, or the service providers of the services (which amendments shall not take effect until agreed to and signed by the eligible individual or, as appropriate, the individual's representative, and by a qualified vocational rehabilitation counselor employed by the designated State unit).

(3) Mandatory components of an individualized plan for employment

Regardless of the approach selected by an eligible individual to develop an individualized plan for employment, an individualized plan for employment shall, at a minimum, contain mandatory components consisting of -

(A) a description of the specific employment outcome that is chosen by the eligible individual, consistent with the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the eligible individual, and, to the maximum extent appropriate, results in employment in an integrated setting;

(B)(i) a description of the specific vocational rehabilitation services that are -

(I) needed to achieve the employment outcome, including, as appropriate, the provision of assistive technology devices and assistive technology services, and personal assistance services, including training in the management of such services; and

(II) provided in the most integrated setting that is appropriate for the service involved and is consistent with the informed choice of the eligible individual; and

(ii) timelines for the achievement of the employment outcome and for the initiation of the services;

(C) a description of the entity chosen by the eligible individual or, as appropriate, the individual's representative, that will provide the vocational rehabilitation services, and the methods used to procure such services;

(D) a description of criteria to evaluate progress toward achievement of the employment outcome;

(E) the terms and conditions of the individualized plan for employment, including, as appropriate, information describing -

(i) the responsibilities of the designated State unit;

(ii) the responsibilities of the eligible individual, including -

(I) the responsibilities the eligible individual will assume in relation to the employment outcome of the individual;

(II) if applicable, the participation of the eligible individual in paying for the costs of the plan; and

(III) the responsibility of the eligible individual with regard to applying for and securing comparable benefits as described in section 721(a)(8) of this title; and

(iii) the responsibilities of other entities as the result of arrangements made pursuant to comparable services or benefits requirements as described in section 721(a)(8) of this title;

(F) for an eligible individual with the most significant disabilities for whom an employment outcome in a supported employment setting has been determined to be appropriate, information identifying -

(i) the extended services needed by the eligible individual; and

(ii) the source of extended services or, to the extent that the source of the extended services cannot be identified at the time of the development of the individualized plan for employment, a description of the basis for concluding that there is a reasonable expectation that such source will become available; and

(G) as determined to be necessary, a statement of projected need for post-employment services.

(c) Procedures

(1) In general

Each State shall establish procedures for mediation of, and procedures for review through an impartial due process hearing of, determinations made by personnel of the designated State unit that affect the provision of vocational rehabilitation services to applicants or eligible individuals.

(2) Notification

(A) Rights and assistance

The procedures shall provide that an applicant or an eligible individual or, as appropriate, the applicant's representative or individual's representative shall be notified of -

(i) the right to obtain review of determinations described in paragraph (1) in an impartial due process hearing under paragraph (5);

(ii) the right to pursue mediation with respect to the determinations under paragraph (4); and

(iii) the availability of assistance from the client assistance program under section 732 of this title.

(B) Timing

Such notification shall be provided in writing -

(i) at the time an individual applies for vocational rehabilitation services provided under this subchapter;

(ii) at the time the individualized plan for employment for the individual is developed; and

(iii) upon reduction, suspension, or cessation of vocational rehabilitation services for the individual.

(3) Evidence and representation

The procedures required under this subsection shall, at a minimum -

(A) provide an opportunity for an applicant or an eligible individual, or, as appropriate, the applicant's representative or individual's representative, to submit at the mediation session or hearing evidence and information to support the position of the applicant or eligible individual; and

(B) include provisions to allow an applicant or an eligible individual to be represented in the mediation session or hearing by a person selected by the applicant or eligible individual.

(4) Mediation

(A) Procedures

Each State shall ensure that procedures are established and implemented under this subsection to allow parties described in paragraph (1) to disputes involving any determination described in paragraph (1) to resolve such disputes through a mediation process that, at a minimum, shall be available whenever a hearing is requested under this subsection.

(B) Requirements

Such procedures shall ensure that the mediation process -

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay the right of an individual to a hearing under this subsection, or to deny any other right afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(C) List of mediators

The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws (including regulations) relating to the provision of vocational rehabilitation services under this subchapter, from which the mediators described in subparagraph (B) shall be selected.

(D) Cost

The State shall bear the cost of the mediation process.

(E) Scheduling

Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) Agreement

An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Confidentiality

Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(H) Construction

Nothing in this subsection shall be construed to preclude the parties to such a dispute from informally resolving the dispute prior to proceedings under this paragraph or paragraph (5), if the informal process used is not used to deny or delay the right of the applicant or eligible individual to a hearing under this subsection or to deny any other right afforded under this subchapter.

(5) Hearings

(A) Officer

A due process hearing described in paragraph (2) shall be conducted by an impartial hearing officer who shall issue a decision based on the provisions of the approved State plan, this chapter (including regulations implementing this chapter), and State regulations and policies that are consistent with the Federal requirements specified in this subchapter. The officer shall provide the decision in writing to the applicant or eligible individual, or, as appropriate, the applicant's representative or individual's representative, and to the designated State unit.

(B) List

The designated State unit shall maintain a list of qualified impartial hearing officers who are knowledgeable in laws (including regulations) relating to the provision of vocational rehabilitation services under this subchapter from which the officer described in subparagraph (A) shall be selected. For the purposes of maintaining such list, impartial hearing officers shall be identified jointly by -

(i) the designated State unit; and

(ii) members of the Council or commission, as appropriate, described in section 721(a)(21) of this title.

(C) Selection

Such an impartial hearing officer shall be selected to hear a particular case relating to a determination -

(i) on a random basis; or

(ii) by agreement between -

(I) the Director of the designated State unit and the individual with a disability; or

(II) in appropriate cases, the Director and the individual's representative.

(D) Procedures for seeking review

A State may establish procedures to enable a party involved in a hearing under this paragraph to seek an impartial review of the decision of the hearing officer under subparagraph (A) by -

(i) the chief official of the designated State agency if the State has established both a designated State agency and a designated State unit under section 721(a)(2) of this title; or

(ii) an official from the office of the Governor.

(E) Review request

If the State establishes impartial review procedures under subparagraph (D), either party may request the review of the decision of the hearing officer within 20 days after the decision.

(F) Reviewing official

The reviewing official described in subparagraph (D) shall -

(i) in conducting the review, provide an opportunity for the submission of additional evidence and information relevant to a final decision concerning the matter under review;

(ii) not overturn or modify the decision of the hearing officer, or part of the decision, that supports the position of the applicant or eligible individual unless the reviewing official concludes, based on clear and convincing evidence, that the decision of the impartial hearing officer is clearly erroneous on the basis of being contrary to the approved State plan, this chapter (including regulations implementing this chapter) or any State regulation or policy that is consistent with the Federal requirements specified in this subchapter;

(iii) make a final decision with respect to the matter in a timely manner and provide such decision in writing to the applicant or eligible individual, or, as appropriate, the applicant's representative or individual's representative, and to the designated State unit, including a full report of the findings and the grounds for such decision; and

(iv) not delegate the responsibility for making the final decision to any officer or employee of the designated State unit.

(G) Finality of hearing decision

A decision made after a hearing under subparagraph (A) shall be final, except that a party may request an impartial review if the State has established procedures for such review under subparagraph (D) and a party involved in a hearing may bring a civil action under subparagraph (J).

(H) Finality of review

A decision made under subparagraph (F) shall be final unless such a party brings a civil action under subparagraph (J).

(I) Implementation

If a party brings a civil action under subparagraph (J) to challenge a final decision of a hearing officer under subparagraph (A) or to challenge a final decision of a State reviewing official under subparagraph (F), the final decision involved shall be implemented pending review by the court.

(J) Civil action

(i) In general

Any party aggrieved by a final decision described in subparagraph (I), may bring a civil action for review of such decision. The action may be brought in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

(ii) Procedure

In any action brought under this subparagraph, the court -

(I) shall receive the records relating to the hearing under subparagraph (A) and the records relating to the State review under subparagraphs (D) through (F), if applicable;

(II) shall hear additional evidence at the request of a party to the action; and

(III) basing the decision of the court on the preponderance of the evidence, shall grant such relief as the court determines to be appropriate.

(6) Hearing board

(A) In general

A fair hearing board, established by a State before January 1, 1985, and authorized under State law to review determinations or decisions under this chapter, is authorized to carry out the responsibilities of the impartial hearing officer under this subsection.

(B) Application

The provisions of paragraphs (1), (2), and (3) that relate to due process hearings do not apply, and paragraph (5) (other than subparagraph (J)) does not apply, to any State to which subparagraph (A) applies.

(7) Impact on provision of services

Unless the individual with a disability so requests, or, in an appropriate case, the individual's representative, so requests, pending a decision by a mediator, hearing officer, or reviewing officer under this subsection, the designated State unit shall not institute a suspension, reduction, or termination of services being provided for the individual, including evaluation and assessment services and plan development, unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual, or the individual's representative.

(8) Information collection and report

(A) In general

The Director of the designated State unit shall collect information described in subparagraph (B) and prepare and submit to the Commissioner a report containing such information. The Commissioner shall prepare a summary of the information furnished under this paragraph and include the summary in the annual report submitted under section 710 of this title. The Commissioner shall also collect copies of the final decisions of impartial hearing officers conducting hearings under this subsection and State officials conducting reviews under this subsection.

(B) Information

The information required to be collected under this subsection includes -

(i) a copy of the standards used by State reviewing officials for reviewing decisions made by impartial hearing officers under this subsection;

(ii) information on the number of hearings and reviews sought from the impartial hearing officers and the State reviewing officials, including the type of complaints and the issues involved;

(iii) information on the number of hearing decisions made under this subsection that were not reviewed by the State reviewing officials; and

(iv) information on the number of the hearing decisions that were reviewed by the State reviewing officials, and, based on such reviews, the number of hearing decisions that were -

(I) sustained in favor of an applicant or eligible individual;

(II) sustained in favor of the designated State unit;

(III) reversed in whole or in part in favor of the applicant or eligible individual; and

(IV) reversed in whole or in part in favor of the designated State unit.

(C) Confidentiality

The confidentiality of records of applicants and eligible individuals maintained by the designated State unit shall not preclude the access of the Commissioner to those records for the purposes described in subparagraph (A).

(d) Policies and procedures

Each designated State agency, in consultation with the State Rehabilitation Council, if the State has such a council, shall, consistent with section 720(a)(3)(C) of this title, develop and implement written policies and procedures that enable each individual who is an applicant for or eligible to receive vocational rehabilitation services under this subchapter to exercise informed choice throughout the vocational rehabilitation process carried out under this subchapter, including policies and procedures that require the designated State agency -

(1) to inform each such applicant and eligible individual (including students with disabilities who are making the transition from programs under the responsibility of an educational agency to programs under the responsibility of the designated State unit), through appropriate modes of communication, about the availability of, and opportunities to exercise, informed choice, including the availability of support services for individuals with cognitive or other disabilities who require assistance in exercising informed choice, throughout the vocational rehabilitation process;

(2) to assist applicants and eligible individuals in exercising informed choice in decisions related to the provision of assessment services under this subchapter;

(3) to develop and implement flexible procurement policies and methods that facilitate the provision of services, and that afford eligible individuals meaningful choices among the methods used to procure services, under this subchapter;

(4) to provide or assist eligible individuals in acquiring information that enables those individuals to exercise informed choice under this subchapter in the selection of -

(A) the employment outcome;

(B) the specific vocational rehabilitation services needed to achieve the employment outcome;

(C) the entity that will provide the services;

(D) the employment setting and the settings in which the services will be provided; and

(E) the methods available for procuring the services; and

(5) to ensure that the availability and scope of informed choice provided under this section is consistent with the obligations of the designated State agency under this subchapter.

29 USC § 723

§ 723. Vocational rehabilitation services

(a) Vocational rehabilitation services for individuals

Vocational rehabilitation services provided under this subchapter are any services described in an individualized plan for employment necessary to assist an individual with a disability in preparing for, securing, retaining, or regaining an employment outcome that is consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual, including -

(1) an assessment for determining eligibility and vocational rehabilitation needs by qualified personnel, including, if appropriate, an assessment by personnel skilled in rehabilitation technology;

(2) counseling and guidance, including information and support services to assist an individual in exercising informed choice consistent with the provisions of section 722(d) of this title;

(3) referral and other services to secure needed services from other agencies through agreements developed under

section 721(a)(11) of this title, if such services are not available under this subchapter;

(4) job-related services, including job search and placement assistance, job retention services, followup services, and follow- along services;

(5) vocational and other training services, including the provision of personal and vocational adjustment services, books, tools, and other training materials, except that no training services provided at an institution of higher education shall be paid for with funds under this subchapter unless maximum efforts have been made by the designated State unit and the individual to secure grant assistance, in whole or in part, from other sources to pay for such training;

(6) to the extent that financial support is not readily available from a source (such as through health insurance of the individual or through comparable services and benefits consistent with section 721(a)(8)(A) of this title), other than the designated State unit, diagnosis and treatment of physical and mental impairments, including -

(A) corrective surgery or therapeutic treatment necessary to correct or substantially modify a physical or mental condition that constitutes a substantial impediment to employment, but is of such a nature that such correction or modification may reasonably be expected to eliminate or reduce such impediment to employment within a reasonable length of time;

(B) necessary hospitalization in connection with surgery or treatment;

(C) prosthetic and orthotic devices;

(D) eyeglasses and visual services as prescribed by qualified personnel who meet State licensure laws and who are selected by the individual;

(E) special services (including transplantation and dialysis), artificial kidneys, and supplies necessary for the treatment of individuals with end-stage renal disease; and

(F) diagnosis and treatment for mental and emotional disorders by qualified personnel who meet State licensure laws;

(7) maintenance for additional costs incurred while participating in an assessment for determining eligibility and vocational rehabilitation needs or while receiving services under an individualized plan for employment;

(8) transportation, including adequate training in the use of public transportation vehicles and systems, that is provided in connection with the provision of any other service described in this section and needed by the individual to achieve an employment outcome;

(9) on-the-job or other related personal assistance services provided while an individual is receiving other services described in this section;

(10) interpreter services provided by qualified personnel for individuals who are deaf or hard of hearing, and reader services for individuals who are determined to be blind, after an examination by qualified personnel who meet State licensure laws;

(11) rehabilitation teaching services, and orientation and mobility services, for individuals who are blind;

(12) occupational licenses, tools, equipment, and initial stocks and supplies;

(13) technical assistance and other consultation services to conduct market analyses, develop business plans, and otherwise provide resources, to the extent such resources are authorized to be provided through the statewide workforce investment system, to eligible individuals who are pursuing self-employment or telecommuting or establishing a small business operation as an employment outcome;

(14) rehabilitation technology, including telecommunications, sensory, and other technological aids and devices;

(15) transition services for students with disabilities, that facilitate the achievement of the employment outcome identified in the individualized plan for employment;

(16) supported employment services;

(17) services to the family of an individual with a disability necessary to assist the individual to achieve an employment outcome; and

(18) specific post-employment services necessary to assist an individual with a disability to, retain, regain, or advance in employment.

(b) Vocational rehabilitation services for groups of individuals

Vocational rehabilitation services provided for the benefit of groups of individuals with disabilities may also include the following:

(1) In the case of any type of small business operated by individuals with significant disabilities the operation of which can be improved by management services and supervision provided by the designated State agency, the provision of such services and supervision, along or together with the acquisition by the designated State agency of vending facilities or other equipment and initial stocks and supplies.

(2)(A) The establishment, development, or improvement of community rehabilitation programs, including, under special circumstances, the construction of a facility. Such programs shall be used to provide services that promote integration and competitive employment.

(B) The provision of other services, that promise to contribute substantially to the rehabilitation of a group of individuals but that are not related directly to the individualized plan for employment of any 1 individual with a disability.

(3) The use of telecommunications systems (including telephone, television, satellite, radio, and other similar systems) that have the potential for substantially improving

delivery methods of activities described in this section and developing appropriate programming to meet the particular needs of individuals with disabilities.

(4)(A) Special services to provide nonvisual access to information for individuals who are blind, including the use of telecommunications, Braille, sound recordings, or other appropriate media.

(B) Captioned television, films, or video cassettes for individuals who are deaf or hard of hearing.

(C) Tactile materials for individuals who are deaf-blind.

(D) Other special services that provide information through tactile, vibratory, auditory, and visual media.

(5) Technical assistance and support services to businesses that are not subject to title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and that are seeking to employ individuals with disabilities.

(6) Consultative and technical assistance services to assist educational agencies in planning for the transition of students with disabilities from school to post-school activities, including employment.

29 USC § 724

§ 724. Non-Federal share for establishment of program or construction

For the purpose of determining the amount of payments to States for carrying out part B of this subchapter (or to an Indian tribe under part C of this subchapter), the non-Federal share, subject to such limitations and conditions as may be prescribed in regulations by the Commissioner, shall include contributions of funds made by any private agency, organization, or individual to a State or local agency to assist in meeting the costs of establishment of a community rehabilitation program or construction, under special circumstances, of a facility for such a program, which would be regarded as State or local funds except for the condition, imposed by the contributor, limiting use of such funds to establishment of such a program or construction of such a facility.

29 USC § 725

§ 725. State Rehabilitation Council

(a) Establishment

(1) In general

Except as provided in section 721(a)(21)(A)(i) of this title, to be eligible to receive financial assistance under this subchapter a State shall establish a State Rehabilitation Council (referred to in this section as the "Council") in accordance with this section.

(2) Separate agency for individuals who are blind

A State that designates a State agency to administer the part of the State plan under which vocational rehabilitation services are provided for individuals who are blind under section 721(a)(2)(A)(i) of this title may establish a separate Council in accordance with this section to perform the duties of such a Council with respect to such State agency.

(b) Composition and appointment

(1) Composition

(A) In general

Except in the case of a separate Council established under subsection (a)(2) of this section, the Council shall be composed of -

(i) at least one representative of the Statewide Independent Living Council established under section 796d of this title, which representative may be the chairperson or other designee of the Council;

(ii) at least one representative of a parent training and information center established pursuant to section 671 of the Individuals with Disabilities Education Act [20 U.S.C. 1471];

(iii) at least one representative of the client assistance program established under section 732 of this title;

(iv) at least one qualified vocational rehabilitation counselor, with knowledge of and experience with vocational rehabilitation programs, who shall serve as an ex officio, nonvoting member of the Council if the counselor is an employee of the designated State agency;

(v) at least one representative of community rehabilitation program service providers;

(vi) four representatives of business, industry, and labor;

(vii) representatives of disability advocacy groups representing a cross section of -

(I) individuals with physical, cognitive, sensory, and mental disabilities; and

(II) individuals' representatives of individuals with disabilities who have difficulty in representing themselves or are unable due to their disabilities to represent themselves;

(viii) current or former applicants for, or recipients of, vocational rehabilitation services;

(ix) in a State in which one or more projects are carried out under section 741 of this title, at least one representative of the directors of the projects;

(x) at least one representative of the State educational agency responsible for the public education of students with disabilities who are eligible to receive services under this subchapter and part B of the Individuals with Disabilities Education Act [20 U.S.C. 1411 et seq.]; and

(xi) at least one representative of the State workforce investment board.

(B) Separate Council

In the case of a separate Council established under subsection (a)(2) of this section, the Council shall be composed of -

(i) at least one representative described in subparagraph (A)(i);

(ii) at least one representative described in subparagraph (A)(ii);

(iii) at least one representative described in subparagraph (A)(iii);

(iv) at least one vocational rehabilitation counselor described in subparagraph (A)(iv), who shall serve as described in such subparagraph;

(v) at least one representative described in subparagraph (A)(v);

(vi) four representatives described in subparagraph (A)(vi);

(vii) at least one representative of a disability advocacy group representing individuals who are blind;

(viii) at least one individual's representative, of an individual who -

(I) is an individual who is blind and has multiple disabilities; and

(II) has difficulty in representing himself or herself or is unable due to disabilities to represent himself or herself;

(ix) applicants or recipients described in subparagraph (A)(viii);

(x) in a State described in subparagraph (A)(ix), at least one representative described in such subparagraph;

(xi) at least one representative described in subparagraph (A)(x); and

(xii) at least one representative described in subparagraph (A)(xi).

(C) Exception

In the case of a separate Council established under subsection (a)(2) of this section, any Council that is required by State law, as in effect on October 29, 1992, to have fewer than 15 members shall be deemed to be in compliance with subparagraph (B) if the Council -

(i) meets the requirements of subparagraph (B), other than the requirements of clauses (vi) and (ix) of such subparagraph; and

(ii) includes at least -

(I) one representative described in subparagraph (B)(vi); and

(II) one applicant or recipient described in subparagraph (B)(ix).

(2) Ex officio member

The Director of the designated State unit shall be an ex officio, nonvoting member of the Council.

(3) Appointment

Members of the Council shall be appointed by the Governor or, in the case of a State that, under State law, vests authority for the administration of the activities carried out under this chapter in an entity other than the Governor (such as one or more houses of the State legislature or an independent board), the chief officer of that entity. The appointing authority shall select members after soliciting recommendations from representatives of organizations representing a broad range of individuals with disabilities and organizations interested in individuals with disabilities. In selecting members, the appointing authority shall consider, to the greatest extent practicable, the extent to which minority populations are represented on the Council.

(4) Qualifications

(A) In general

A majority of Council members shall be persons who are -

(i) individuals with disabilities described in section 705(20)(B) of this title; and

(ii) not employed by the designated State unit.

(B) Separate Council

In the case of a separate Council established under subsection (a)(2) of this section, a majority of Council members shall be persons who are -

(i) blind; and

(ii) not employed by the designated State unit.

(5) Chairperson

(A) In general

Except as provided in subparagraph (B), the Council shall select a chairperson from among the membership of the Council.

(B) Designation by chief executive officer

In States in which the chief executive officer does not have veto power pursuant to State law, the appointing authority described in paragraph (3) shall designate a member of the Council to serve as the chairperson of the Council or shall require the Council to so designate such a member.

(6) Terms of appointment

(A) Length of term

Each member of the Council shall serve for a term of not more than 3 years, except that -

(i) a member appointed to fill a vacancy occurring prior to the expiration of the term for which a predecessor was appointed, shall be appointed for the remainder of such term; and

(ii) the terms of service of the members initially appointed shall be (as specified by the appointing authority described in paragraph (3)) for such fewer number of years as will provide for the expiration of terms on a staggered basis.

(B) Number of terms

No member of the Council, other than a representative described in clause (iii) or (ix) of paragraph (1)(A), or clause (iii) or (x) of paragraph (1)(B), may serve more than two consecutive full terms.

(7) Vacancies

(A) In general

Except as provided in subparagraph (B), any vacancy occurring in the membership of the Council shall be filled in the same manner as the original appointment. The vacancy shall not affect the power of the remaining members to execute the duties of the Council.

(B) Delegation

The appointing authority described in paragraph (3) may delegate the authority to fill such a vacancy to the remaining members of the Council after making the original appointment.

(c) Functions of Council

The Council shall, after consulting with the State workforce investment board -

(1) review, analyze, and advise the designated State unit regarding the performance of the responsibilities of the unit under this subchapter, particularly responsibilities relating to -

(A) eligibility (including order of selection);

(B) the extent, scope, and effectiveness of services provided; and

(C) functions performed by State agencies that affect or that potentially affect the ability of individuals with disabilities in achieving employment outcomes under this subchapter;

(2) in partnership with the designated State unit -

(A) develop, agree to, and review State goals and priorities in accordance with section 721(a)(15)(C) of this title; and

(B) evaluate the effectiveness of the vocational rehabilitation program and submit reports of progress to the Commissioner in accordance with section 721(a)(15)(E) of this title;

(3) advise the designated State agency and the designated State unit regarding activities authorized to be carried out under this subchapter, and assist in the

preparation of the State plan and amendments to the plan, applications, reports, needs assessments, and evaluations required by this subchapter;

(4) to the extent feasible, conduct a review and analysis of the effectiveness of, and consumer satisfaction with -

(A) the functions performed by the designated State agency;

(B) vocational rehabilitation services provided by State agencies and other public and private entities responsible for providing vocational rehabilitation services to individuals with disabilities under this chapter; and

(C) employment outcomes achieved by eligible individuals receiving services under this subchapter, including the availability of health and other employment benefits in connection with such employment outcomes;

(5) prepare and submit an annual report to the Governor and the Commissioner on the status of vocational rehabilitation programs operated within the State, and make the report available to the public;

(6) to avoid duplication of efforts and enhance the number of individuals served, coordinate activities with the activities of other councils within the State, including the Statewide Independent Living Council established under section 796d of this title, the advisory panel established under section 612(a)(20) of the Individuals with Disabilities Education Act [20 U.S.C. 1412(a)(20)], the State Council on Developmental Disabilities established under section 15025 of title 42, the State mental health planning council established under section 300x-3(a) of title 42, and the State workforce investment board;

(7) provide for coordination and the establishment of working relationships between the designated State agency and the Statewide Independent Living Council and centers for independent living within the State; and

(8) perform such other functions, consistent with the purpose of this subchapter, as the State Rehabilitation

Council determines to be appropriate, that are comparable to the other functions performed by the Council.

(d) Resources

(1) Plan

The Council shall prepare, in conjunction with the designated State unit, a plan for the provision of such resources, including such staff and other personnel, as may be necessary and sufficient to carry out the functions of the Council under this section. The resource plan shall, to the maximum extent possible, rely on the use of resources in existence during the period of implementation of the plan.

(2) Resolution of disagreements

To the extent that there is a disagreement between the Council and the designated State unit in regard to the resources necessary to carry out the functions of the Council as set forth in this section, the disagreement shall be resolved by the Governor consistent with paragraph (1).

(3) Supervision and evaluation

Each Council shall, consistent with State law, supervise and evaluate such staff and other personnel as may be necessary to carry out its functions under this section.

(4) Personnel conflict of interest

While assisting the Council in carrying out its duties, staff and other personnel shall not be assigned duties by the designated State unit or any other agency or office of the State, that would create a conflict of interest.

(e) Conflict of interest

No member of the Council shall cast a vote on any matter that would provide direct financial benefit to the member or otherwise give the appearance of a conflict of interest under State law.

(f) Meetings

The Council shall convene at least four meetings a year in such places as it determines to be necessary to conduct Council business and conduct such forums or hearings as the Council considers appropriate. The meetings, hearings, and forums shall be publicly announced. The meetings shall be open and accessible to the general public unless there is a valid reason for an executive session.

(g) Compensation and expenses

The Council may use funds allocated to the Council by the designated State unit under this subchapter (except for funds appropriated to carry out the client assistance program under section 732 of this title and funds reserved pursuant to section 730(c) of this title to carry out part C of this subchapter) to reimburse members of the Council for reasonable and necessary expenses of attending Council meetings and performing Council duties (including child care and personal assistance services), and to pay compensation to a member of the Council, if such member is not employed or must forfeit wages from other employment, for each day the member is engaged in performing the duties of the Council.

(h) Hearings and forums

The Council is authorized to hold such hearings and forums as the Council may determine to be necessary to carry out the duties of the Council.

29 USC § 726

§ 726. Evaluation standards and performance indicators

(a) Establishment

(1) In general

(A) Establishment of standards and indicators

The Commissioner shall, not later than July 1, 1999, establish and publish evaluation standards and performance indicators for the vocational rehabilitation program carried out under this subchapter.

(B) Review and revision

Effective July 1, 1999, the Commissioner shall review and, if necessary, revise the evaluation standards and performance indicators every 3 years. Any revisions of the standards and indicators shall be developed with input from State vocational rehabilitation agencies, related professional and consumer organizations, recipients of vocational rehabilitation services, and other interested parties. Any revisions of the standards and indicators shall be subject to the publication, review, and comment provisions of paragraph (3).

(C) Bases

Effective July 1, 1999, to the maximum extent practicable, the standards and indicators shall be consistent with the core indicators of performance established under section 2871(b) of this title.

(2) Measures

The standards and indicators shall include outcome and related measures of program performance that facilitate the accomplishment of the purpose and policy of this subchapter.

(3) Comment

The standards and indicators shall be developed with input from State vocational rehabilitation agencies, related professional and consumer organizations, recipients of vocational rehabilitation services, and other interested parties. The Commissioner shall publish in the Federal Register a notice of intent to regulate regarding the development of proposed standards and indicators. Proposed standards and indicators shall be published in the Federal Register for review and comment. Final standards and indicators shall be published in the Federal Register.

(b) Compliance

(1) State reports

In accordance with regulations established by the Secretary, each State shall report to the Commissioner after the end of each fiscal year the extent to which the State is in compliance with the standards and indicators.

(2) Program improvement

(A) Plan

If the Commissioner determines that the performance of any State is below established standards, the Commissioner shall provide technical assistance to the State, and the State and the Commissioner shall jointly develop a program improvement plan outlining the specific actions to be taken by the State to improve program performance.

(B) Review

The Commissioner shall -

(i) review the program improvement efforts of the State on a biannual basis and, if necessary, request the State to make further revisions to the plan to improve performance; and

(ii) continue to conduct such reviews and request such revisions until the State sustains satisfactory performance over a period of more than 1 year.

(c) Withholding

If the Commissioner determines that a State whose performance falls below the established standards has failed to enter into a program improvement plan, or is not complying substantially with the terms and conditions of such a program improvement plan, the Commissioner shall, consistent with subsections (c) and (d) of section 727 of this title, reduce or make no further payments to the State under this program, until the State has entered into an approved program improvement plan, or satisfies the Commissioner that the State is complying substantially with the terms and conditions of such a program improvement plan, as appropriate.

(d) Report to Congress

Beginning in fiscal year 1999, the Commissioner shall include in each annual report to the Congress under section 710 of this title an analysis of program performance, including relative State performance, based on the standards and indicators.

29 USC § 727

§ 727. Monitoring and review

(a) In general

(1) Duties

In carrying out the duties of the Commissioner under this subchapter, the Commissioner shall -

(A) provide for the annual review and periodic onsite monitoring of programs under this subchapter; and

(B) determine whether, in the administration of the State plan, a State is complying substantially with the provisions of such plan and with evaluation standards and performance indicators established under section 726 of this title.

(2) Procedures for reviews

In conducting reviews under this section the Commissioner shall consider, at a minimum -

(A) State policies and procedures;

(B) guidance materials;

(C) decisions resulting from hearings conducted in accordance with due process;

(D) State goals established under section 721(a)(15) of this title and the extent to which the State has achieved such goals;

(E) plans and reports prepared under section 726(b) of this title;

(F) consumer satisfaction reviews and analyses described in section 725(c)(4) of this title;

(G) information provided by the State Rehabilitation Council established under section 725 of this title, if the State has such a Council, or by the commission described in section 721(a)(21)(A)(i) of this title, if the State has such a commission;

(H) reports; and

(I) budget and financial management data.

(3) Procedures for monitoring

In conducting monitoring under this section the Commissioner shall conduct -

(A) onsite visits, including onsite reviews of records to verify that the State is following requirements regarding the order of selection set forth in section 721(a)(5)(A) of this title;

(B) public hearings and other strategies for collecting information from the public;

(C) meetings with the State Rehabilitation Council, if the State has such a Council or with the commission described in section 721(a)(21)(A)(i) of this title, if the State has such a commission;

(D) reviews of individual case files, including individualized plans for employment and ineligibility determinations; and

(E) meetings with qualified vocational rehabilitation counselors and other personnel.

(4) Areas of inquiry

In conducting the review and monitoring, the Commissioner shall examine -

(A) the eligibility process;

(B) the provision of services, including, if applicable, the order of selection;

(C) such other areas as may be identified by the public or through meetings with the State Rehabilitation Council, if the State has such a Council or with the commission described in section 721(a)(21)(A)(i) of this title, if the State has such a commission; and

(D) such other areas of inquiry as the Commissioner may consider appropriate.

(5) Reports

If the Commissioner issues a report detailing the findings of an annual review or onsite monitoring conducted under this section, the report shall be made available to the

State Rehabilitation Council, if the State has such a Council, for use in the development and modification of the State plan described in section 721 of this title.

(b) Technical assistance

The Commissioner shall -

(1) provide technical assistance to programs under this subchapter regarding improving the quality of vocational rehabilitation services provided; and

(2) provide technical assistance and establish a corrective action plan for a program under this subchapter if the Commissioner finds that the program fails to comply substantially with the provisions of the State plan, or with evaluation standards or performance indicators established under section 726 of this title, in order to ensure that such failure is corrected as soon as practicable.

(c) Failure to comply with plan

(1) Withholding payments

Whenever the Commissioner, after providing reasonable notice and an opportunity for a hearing to the State agency administering or supervising the administration of the State plan approved under section 721 of this title, finds that -

(A) the plan has been so changed that it no longer complies with the requirements of section 721(a) of this title; or

(B) in the administration of the plan there is a failure to comply substantially with any provision of such plan or with an evaluation standard or performance indicator established under section 726 of this title, the Commissioner shall notify such State agency that no further payments will be made to the State under this subchapter (or, in the discretion of the Commissioner, that such further payments will be reduced, in accordance with regulations the Commissioner shall prescribe, or that further payments will not be made to the State only for the projects under the parts of the State plan affected by such failure), until the Commissioner is satisfied there is no longer any such failure.

(2) Period

Until the Commissioner is so satisfied, the Commissioner shall make no further payments to such State under this subchapter (or shall reduce payments or limit payments to projects under those parts of the State plan in which there is no such failure).

(3) Disbursal of withheld funds

The Commissioner may, in accordance with regulations the Secretary shall prescribe, disburse any funds withheld from a State under paragraph (1) to any public or nonprofit private organization or agency within such State or to any political subdivision of such State submitting a plan meeting the requirements of section 721(a) of this title. The Commissioner may not make any payment under this paragraph unless the entity to which such payment is made has provided assurances to the Commissioner that such entity will contribute, for purposes of carrying out such plan, the same amount as the State would have been obligated to contribute if the State received such payment.

(d) Review

(1) Petition

Any State that is dissatisfied with a final determination of the Commissioner under section 721(b) of this title or subsection

(c) of this section may file a petition for judicial review of such determination in the United States Court of Appeals for the circuit in which the State is located. Such a petition may be filed only within the 30-day period beginning on the date that notice of such final determination was received by the State. The clerk of the court shall transmit a copy of the petition to the Commissioner or to any officer designated by the Commissioner for that purpose. In accordance with section 2112 of title 28, the Commissioner shall file with the court a record of the proceeding on which the Commissioner based the determination being appealed by the State. Until a record is so filed, the Commissioner may modify or set aside any determination made under such proceedings.

(2) Submissions and determinations

If, in an action under this subsection to review a final determination of the Commissioner under section 721(b) of this title or subsection (c) of this section, the petitioner or the Commissioner applies to the court for leave to have additional oral submissions or written presentations made respecting such determination, the court may, for good cause shown, order the Commissioner to provide within 30 days an additional opportunity to make such submissions and presentations. Within such period, the Commissioner may revise any findings of fact, modify or set aside the determination being reviewed, or make a new determination by reason of the additional submissions and presentations, and shall file such modified or new determination, and any revised findings of fact, with the return of such submissions and presentations. The court shall thereafter review such new or modified determination.

(3) Standards of review

(A) In general

Upon the filing of a petition under paragraph (1) for judicial review of a determination, the court shall have jurisdiction -

(i) to grant appropriate relief as provided in chapter 7 of title 5, except for interim relief with respect to a determination under subsection (c) of this section; and

(ii) except as otherwise provided in subparagraph (B), to review such determination in accordance with chapter 7 of title 5.

(B) Substantial evidence

Section 706 of title 5 shall apply to the review of any determination under this subsection, except that the standard for review prescribed by paragraph (2)(E) of such section 706 shall not apply and the court shall hold unlawful and set aside such determination if the court finds that the determination is not supported by substantial evidence in the record of the proceeding submitted pursuant to paragraph (1), as supplemented by any additional submissions and presentations filed under paragraph (2).

29 USC § 728

§ 728. Expenditure of certain amounts

(a) Expenditure

Amounts described in subsection (b) of this section may not be expended by a State for any purpose other than carrying out programs for which the State receives financial assistance under this subchapter, under part B of subchapter VI of this chapter, or under subchapter VII of this chapter.

(b) Amounts

The amounts referred to in subsection (a) of this section are amounts provided to a State under the Social Security Act (42 U.S.C. 301 et seq.) as reimbursement for the expenditure of payments received by the State from allotments under section 730 of this title.

29 USC § 728a

§ 728a. Training of employers with respect to Americans with Disabilities Act of 1990

A State may expend payments received under section 731 of this title -

(1) to carry out a program to train employers with respect to compliance with the requirements of title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.); and

(2) to inform employers of the existence of the program and the availability of the services of the program.

29 USC § 730

§ 730. State allotments

(a) Computation; additional amount; minimum amount; adjustments

(1) Subject to the provisions of subsection (c) of this section, for each fiscal year beginning before October 1, 1978, each State shall be entitled to an allotment of an amount bearing the same ratio to the amount authorized to be appropriated under section 720(b)(1) of this title for allotment under this section as the product of -

(A) the population of the State; and

(B) the square of its allotment percentage, bears to the sum of the corresponding products for all the States.

(2)(A) For each fiscal year beginning on or after October 1, 1978, each State shall be entitled to an allotment in an amount equal to the amount such State received under paragraph (1) for the fiscal year ending September 30, 1978, and an additional amount determined pursuant to subparagraph (B) of this paragraph. (B) For each fiscal year beginning on or after October 1, 1978, each State shall be entitled to an allotment, from any amount authorized to be appropriated for such fiscal year under section 720(b)(1) of this title for allotment under this section in excess of the amount appropriated under section 720(b)(1)(A) of this title for the fiscal year ending September 30, 1978, in an amount equal to the sum of -

(i) an amount bearing the same ratio to 50 percent of such excess amount as the product of the population of the State and the square of its allotment percentage bears to the sum of the corresponding products for all the States; and

(ii) an amount bearing the same ratio to 50 percent of such excess amount as the product of the population of the State and its allotment percentage bears to the sum of the corresponding products for all the States.

(3) The sum of the payment to any State (other than Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands) under this subsection for any fiscal year which is less than 1/3 of 1 percent of the amount appropriated under section 720(b)(1) of this title, or $3,000,000, whichever is greater, shall be increased to that amount, the total of the increases thereby required being derived by proportionately reducing the allotment to each of the remaining such States under this subsection, but with such adjustments as may be necessary to prevent the sum of the allotments made under this subsection to any such remaining State from being thereby reduced to less than that amount.

(b) Unused funds; redistribution; increase in amount

(1) Not later than 45 days prior to the end of the fiscal year, the Commissioner shall determine, after reasonable opportunity for the submission to the Commissioner of comments by the State agency administering or supervising the program established under this subchapter, that any payment of an allotment to a State under section 731(a) of this title for any fiscal year will not be utilized by such State in carrying out the purposes of this subchapter.

(2) As soon as practicable but not later than the end of the fiscal year, the Commissioner shall make such amount available for carrying out the purposes of this subchapter to one or more other States to the extent the Commissioner determines such other State will be able to use such additional amount during that fiscal year or the subsequent fiscal year for carrying out such purposes. The Commissioner shall make such amount available only if such other State will be able to make sufficient payments from non-Federal sources to pay for the non-Federal share of the

cost of vocational rehabilitation services under the State plan for the fiscal year for which the amount was appropriated.

(3) For the purposes of this part, any amount made available to a State for any fiscal year pursuant to this subsection shall be regarded as an increase of such State's allotment (as determined under the preceding provisions of this section) for such year.

(c) Funds for American Indian vocational rehabilitation services

(1) For fiscal year 1987 and for each subsequent fiscal year, the Commissioner shall reserve from the amount appropriated under section 720(b)(1) of this title for allotment under this section a sum, determined under paragraph (2), to carry out the purposes of part C of this subchapter.

(2) The sum referred to in paragraph (1) shall be, as determined by the Secretary -

(A) not less than three-quarters of 1 percent and not more than 1.5 percent of the amount referred to in paragraph (1), for fiscal year 1999; and

(B) not less than 1 percent and not more than 1.5 percent of the amount referred to in paragraph (1), for each of fiscal years 2000 through 2003.

29 USC § 731

§ 731. Payments to States

(a) Amount

(1) Except as provided in paragraph (2), from each State's allotment under this part for any fiscal year, the Commissioner shall pay to a State an amount equal to the Federal share of the cost of vocational rehabilitation services under the plan for that State approved under section 721 of

this title, including expenditures for the administration of the State plan.

(2)(A) The total of payments under paragraph (1) to a State for a fiscal year may not exceed its allotment under subsection (a) of section 730 of this title for such year.

(B) For fiscal year 1994 and each fiscal year thereafter, the amount otherwise payable to a State for a fiscal year under this section shall be reduced by the amount by which expenditures from non-Federal sources under the State plan under this subchapter for the previous fiscal year are less than the total of such expenditures for the second fiscal year preceding the previous fiscal year.

(C) The Commissioner may waive or modify any requirement or limitation under subparagraph (B) or section 721(a)(17) of this title if the Commissioner determines that a waiver or modification is an equitable response to exceptional or uncontrollable circumstances affecting the State.

(3)(A) Except as provided in subparagraph (B), the amount of a payment under this section with respect to any construction project in any State shall be equal to the same percentage of the cost of such project as the Federal share that is applicable in the case of rehabilitation facilities (as defined in section 291o(g) of title 42), in such State.

(B) If the Federal share with respect to rehabilitation facilities in such State is determined pursuant to section 291o(b)(2) of title 42, the percentage of the cost for purposes of this section shall be determined in accordance with regulations prescribed by the Commissioner designed to achieve as nearly as practicable results comparable to the results obtained under such section.

(b) Method of computation and payment

The method of computing and paying amounts pursuant to subsection (a) of this section shall be as follows:

(1) The Commissioner shall, prior to the beginning of each calendar quarter or other period prescribed by the

Commissioner, estimate the amount to be paid to each State under the provisions of such subsection for such period, such estimate to be based on such records of the State and information furnished by it, and such other investigation as the Commissioner may find necessary.

(2) The Commissioner shall pay, from the allotment available therefor, the amount so estimated by the Commissioner for such period, reduced or increased, as the case may be, by any sum (not previously adjusted under this paragraph) by which the Commissioner finds that the estimate of the amount to be paid the State for any prior period under such subsection was greater or less than the amount which should have been paid to the State for such prior period under such subsection. Such payment shall be made prior to audit or settlement by the Government Accountability Office, shall be made through the disbursing facilities of the Treasury Department, and shall be made in such installments as the Commissioner may determine.

PART B
BASIC VOCATIONAL REHABILITATION SERVICES

29 USC § 732

§ 732. Client assistance program

(a) Establishment of grant program

From funds appropriated under subsection (h) of this section, the Secretary shall, in accordance with this section, make grants to States to establish and carry out client assistance programs to provide assistance in informing and advising all clients and client applicants of all available benefits under this chapter, and, upon request of such clients or client applicants, to assist and advocate for such clients or applicants in their relationships with projects, programs, and services provided under this chapter, including assistance and advocacy in pursuing legal, administrative, or other appropriate remedies to ensure the protection of the rights of such individuals under this chapter and to facilitate access to the services funded under this chapter through individual and systemic advocacy. The client assistance program shall provide information on the available services and benefits under this chapter and title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) to individuals with disabilities in the State, especially with regard to individuals with disabilities who have traditionally been unserved or underserved by vocational rehabilitation programs. In providing assistance and advocacy under this subsection with respect to services under this subchapter, a client assistance program may provide the assistance and advocacy with respect to services that are directly related to facilitating the employment of the individual.

(b) Existence of State program as requisite to receiving payments

No State may receive payments from its allotment under this chapter in any fiscal year unless the State has in effect not later than October 1, 1984, a client assistance program which -

(1) has the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of rights of individuals with disabilities who are receiving treatments, services, or rehabilitation under this chapter within the State; and

(2) meets the requirements of designation under subsection (c) of this section.

(c) Designation of agency to conduct program

(1)(A) The Governor shall designate a public or private agency to conduct the client assistance program under this section. Except as provided in the last sentence of this subparagraph, the Governor shall designate an agency which is independent of any agency which provides treatment, services, or rehabilitation to individuals under this chapter. If there is an agency in the State which has, or had, prior to February 22, 1984, served as a client assistance agency under this section and which received Federal financial assistance under this chapter, the Governor may, in the initial designation, designate an agency which provides treatment, services, or rehabilitation to individuals with disabilities under this chapter.

(B)(i) The Governor may not redesignate the agency designated under subparagraph (A) without good cause and unless -

(I) the Governor has given the agency 30 days notice of the intention to make such redesignation, including specification of the good cause for such redesignation and an opportunity to respond to the assertion that good cause has been shown;

(II) individuals with disabilities or the individuals' representatives have timely notice of the redesignation and opportunity for public comment; and

(III) the agency has the opportunity to appeal to the Commissioner on the basis that the redesignation was not for good cause.

(ii) If, after August 7, 1998 -

(I) a designated State agency undergoes any change in the organizational structure of the agency that results in the creation of one or more new State agencies or departments or results in the merger of the designated State agency with one or more other State agencies or departments; and

(II) an agency (including an office or other unit) within the designated State agency was conducting a client assistance program before the change under the last sentence of subparagraph (A), the Governor shall redesignate the agency conducting the program. In conducting the redesignation, the Governor shall designate to conduct the program an agency that is independent of any agency that provides treatment, services, or rehabilitation to individuals with disabilities under this chapter.

(2) In carrying out the provisions of this section, the Governor shall consult with the director of the State vocational rehabilitation agency, the head of the developmental disability protection and advocacy agency, and with representatives of professional and consumer organizations serving individuals with disabilities in the State.

(3) The agency designated under this subsection shall be accountable for the proper use of funds made available to the agency.

(d) Class action by designated agency prohibited

The agency designated under subsection (c) of this section may not bring any class action in carrying out its responsibilities under this section.

(e) Allotment and reallotment of funds

(1)(A) The Secretary shall allot the sums appropriated for each fiscal year under this section among the States on the basis of relative population of each State, except that no State shall receive less than $50,000.

(B) The Secretary shall allot $30,000 each to American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(C) For the purpose of this paragraph, the term "State" does not include American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(D)(i) In any fiscal year that the funds appropriated for such fiscal year exceed $7,500,000, the minimum allotment shall be $100,000 for States and $45,000 for territories.

(ii) For any fiscal year in which the total amount appropriated under subsection (h) of this section exceeds the total amount appropriated under such subsection for the preceding fiscal year, the Secretary shall increase each of the minimum allotments unde clause (i) by a percentage that shall not exceed the percentage increase in the total amount appropriated under such subsection between the preceding fiscal year and the fiscal year involved.

(2) The amount of an allotment to a State for a fiscal year which the Secretary determines will not be required by the State during the period for which it is available for the purpose for which allotted shall be available for reallotment by the Secretary at appropriate times to other States with respect to which such a determination has not been made, in proportion to the original allotments of such States for such fiscal year, but with such proportionate amount for any of such other States being reduced to the extent it exceeds the sum the Secretary estimates such State needs and will be able to use during such period, and the total of such reduction shall be similarly reallotted among the States whose proportionate amounts were not so reduced. Any such amount so reallotted to a State for a fiscal year shall be deemed to be a part of its allotment for such fiscal year.

(3) Except as specifically prohibited by or as otherwise provided in State law, the Secretary shall pay to the agency designated under subsection (c) of this section the amount specified in the application approved under subsection (f) of this section.

(f) Application by State for grant funds

No grant may be made under this section unless the State submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary deems necessary to meet the requirements of this section.

(g) Regulations; minimum requirements

The Secretary shall prescribe regulations applicable to the client assistance program which shall include the following requirements:

(1) No employees of such programs shall, while so employed, serve as staff or consultants of any rehabilitation project, program, or facility receiving assistance under this chapter in the State.

(2) Each program shall be afforded reasonable access to policymaking and administrative personnel in the State and local rehabilitation programs, projects, or facilities.

(3)(A) Each program shall contain provisions designed to assure that to the maximum extent possible alternative means of dispute resolution are available for use at the discretion of an applicant or client of the program prior to resorting to litigation or formal adjudication to resolve a dispute arising under this section.

(B) In subparagraph (A), the term "alternative means of dispute resolution" means any procedure, including good faith negotiation, conciliation, facilitation, mediation, factfinding, and arbitration, and any combination of procedures, that is used in lieu of litigation in a court or formal adjudication in an administrative forum, to resolve a dispute arising under this section.

(4) For purposes of any periodic audit, report, or evaluation of the performance of a client assistance program under this section, the Secretary shall not require such a program to disclose the identity of, or any other personally identifiable information related to, any individual requesting assistance under such program.

(h) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for fiscal years 1999 through 2003 to carry out the provisions of this section.

PART C

AMERICAN INDIAN VOCATIONAL REHABILITATION SERVICES

29 USC § 741

§ 741. Vocational rehabilitation services grants

(a) Governing bodies of Indian tribes; amount; non-Federal share

The Commissioner, in accordance with the provisions of this part, may make grants to the governing bodies of Indian tribes located on Federal and State reservations (and consortia of such governing bodies) to pay 90 percent of the costs of vocational rehabilitation services for American Indians who are individuals with disabilities residing on or near such reservations. The non-Federal share of such costs may be in cash or in kind, fairly valued, and the Commissioner may waive such non-Federal share requirement in order to carry out the purposes of this chapter.

(b) Application; effective period; continuation of programs services; separate service delivery systems

(1) No grant may be made under this part for any fiscal year unless an application therefor has been submitted to and approved by the Commissioner. The Commissioner may not approve an application unless the application -

(A) is made at such time, in such manner, and contains such information as the Commissioner may require;

(B) contains assurances that the rehabilitation services provided under this part to American Indians who are individuals with disabilities residing on or near a reservation in a State shall be, to the maximum extent feasible, comparable to rehabilitation services provided under this subchapter to other individuals with disabilities residing in the State and that, where appropriate, may include services traditionally used by Indian tribes; and

(C) contains assurances that the application was developed in consultation with the designated State unit of the State.

(2) The provisions of sections 450c, 450d, 450e, and 450f(a) of title 25 shall be applicable to any application submitted under this part. For purposes of this paragraph, any reference in any such provision to the Secretary of Education or to the Secretary of the Interior shall be considered to be a reference to the Commissioner.

(3) Any application approved under this part shall be effective for not more than 60 months, except as determined otherwise by the Commissioner pursuant to prescribed regulations. The State continue to provide vocational rehabilitation services under its State plan to American Indians residing on or near a reservation whenever such State includes any such American Indians in its State population under section 730(a)(1) of this title.

(4) In making grants under this part, the Secretary shall give priority consideration to applications for the continuation of programs which have been funded under this part.

(5) Nothing in this section may be construed to authorize a separate service delivery system for Indian residents of a State who reside in non-reservation areas.

(c) "Reservation" defined

The term "reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.].

PART D
VOCATIONAL REHABILITATION SERVICES CLIENT INFORMATION

29 USC § 751

§ 751. Data sharing

(a) In general

(1) Memorandum of understanding

The Secretary of Education and the Secretary of Health and Human Services shall enter into a memorandum of understanding for the purposes of exchanging data of mutual importance -

(A) that concern clients of designated State agencies; and

(B) that are data maintained either by -

(i) the Rehabilitation Services Administration, as required by section 710 of this title; or

(ii) the Social Security Administration, from its Summary Earnings and Records and Master Beneficiary Records.

(2) Employment statistics

The Secretary of Labor shall provide the Commissioner with employment statistics specified in section 491-2 of this title, that facilitate evaluation by the Commissioner of the program carried out under part B of this subchapter, and allow the Commissioner to compare the progress of individuals with disabilities who are assisted under the program in securing, retaining, regaining, and advancing in employment with the progress made by individuals who are assisted under title I of the Workforce Investment Act of 1998 [29 U.S.C. 2801 et seq.].

(b) Treatment of information

For purposes of the exchange described in subsection (a)(1) of this section, the data described in subsection (a)(1)(B)(ii) of this section shall not be considered return information (as defined in section 6103(b)(2) of title 26) and, as appropriate, the confidentiality of all client information shall be maintained by the Rehabilitation Services Administration and the Social Security Administration.

REHABILITATION ACT OF 1973
(Prior to Amendments Made by Pub.L. 99-506 (1986)

§ 504

No otherwise qualified handicapped individual I the United States, as defined in section 706(7) of this Title [now 29 U.S.C. §705(20)] shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity or by the United States Postal Service
[as quoted in *Atascadero State. Hosp. v. Scanlon*, 473 U.S. 234, 245 (1985)]

§505(a)

. . .

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipients of Federal assistance or Federal provider of such assistance under section 504 of this Act
[92 STAT. 2982 – 2983]

APPENDIX E

STATE REGULATIONS

TEXAS REGISTER

ISSUE: Volume 24, Number 10

ISSUE DATE: March 5, 1999

SUBJECT: PROPOSED RULES

24 TEX. REG. 1595

TEXAS ADMINISTRATIVE CODE CITATION: 40 TAC §§ 104.1-104.8

[24 TEX. REG. 1595]

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part II. Texas Rehabilitation Commission

Chapter 104. Informal Appeals, Formal Appeals, and Mediation by Applicants/Clients of Determinations by Agency Personnel that Affect the Provision of Vocational Rehabilitation Services [~~Informal and Formal Appeals by Applicants/Clients of Decisions by a Rehabilitation Counselor or Agency Official~~]

40 TAC §§104.1-104.8

The Texas Rehabilitation Commission (TRC) proposes amendments to §§104.1-104.8, concerning informal appeals, formal appeals, and mediation by applicants/clients of determinations by agency personnel that affect the provision of vocational rehabilitation services.

The sections are being amended to conform the rules to the 1998 amendments to the Rehabilitation Act of 1973, 29 U.S.C. §§701 et. seq.

Charles E. Harrison, Jr., Deputy Commissioner for Financial Services, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications for state or local government.

Mr. Harrison also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be conformity to the 1998 amendments to the Rehabilitation Act of 1973, 29 U.S.C. §§701 et seq. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Roger Darley, Assistant General Counsel, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Suite 7300, Austin, Texas 78751.

The amendments are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

No other statute, article, or code is affected by this proposal.

§104.1. Purpose and Scope.

(a) Purpose. The purpose of these rules is to provide the Texas Rehabilitation Commission with a system for the institution, conduct, and determination of "informal" and "formal appeals" and "mediation" as those terms are defined herein. These rules shall be liberally construed in accordance with the purpose for which they were adopted. These rules inform all applicants and persons served by TRC of their due process right to appeal when they are dissatisfied with any determination made by a rehabilitation counselor or agency official regarding the furnishing or denial of services.

(b) Statutory Authority. These rules are created pursuant to the Rehabilitation Act of 1973, as amended, 29 United States Code Annotated (USCA) §§701 et seq. and Department of Education Regulations at 34 Code of Federal Regulations (CFR), Part 361 [~~§361.48~~]. Federal laws and regulations prevail over state laws and regulations. The Administrative Procedure Act, Texas Government Code Annotated, §§2001.001 et seq. does not apply to client administrative hearings which are conducted pursuant to federal law.

(c) Scope.

(1) This chapter applies to client (applicant) appeals, mediations, and hearings [~~appeals and hearings~~] before the Texas Rehabilitation Commission.

(2) These rules shall be construed to insure fair and expeditious determinations.

[24 TEX. REG. 1595] (3) These rules supplement the procedures required by law.

§104.2. Definitions.

The following words and terms, when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Act--The Rehabilitation Act of 1973 as amended, 29 United States Code §701 et seq.

(2) Appellant--An individual who has filed a petition for administrative hearing.

(3) Applicant--An individual who has applied for services under the Act, but for whom an eligibility determination has not been made. [~~As used in these rules, unless specifically denoted, the terms "client" and "applicant" are synonymous.~~]

(4) Authorized representative--An attorney authorized to practice law in the State of Texas and/or a person designated by the applicant or client to represent them.

(5) Client--An individual who has been determined to be eligible for services by the commission pursuant to the Act and commission rules. As used in these rules, unless specifically denoted, the terms "client" and "applicant" are synonymous.

(6) Client Assistance Program (CAP)--The program created by the Act which provides assistance in informing and advising clients and applicants of all available benefits under the Act. CAP provides assistance and advocacy in pursuing legal, administrative, or other appropriate remedies to ensure protection of the client's rights under the Act if requested by the client or the client's authorized representative.

(7) Commission--The Texas Rehabilitation Commission (TRC), its officers and agents.

[~~Commissioner's Office for Administrative Hearings--An office of the Texas Rehabilitation Commission which provides, among other functions, administrative support to the impartial hearing officer during the formal appeal~~

~~process and is the point of contact for client's questions about the administrative hearings process.~~]

(8) Commissioner [~~Director of state unit/commissioner~~]--The commissioner of the Texas Rehabilitation Commission.

[~~Discovery The process of gathering all relevant information necessary to render a fair and unbiased decision.~~]

(9) Formal appeal--The timely filing of a Petition for Administrative Hearing due to a client's continued dissatisfaction with a decision of the Commission regarding the furnishing or denial of services.

(10) Hearing--A due process formal appeal conducted under these rules by an impartial hearing officer regarding allegations set forth in the client's Petition for Administrative Hearing regarding the furnishing or denial of services. This term includes prehearing conferences.

(11) Hearing completion date--The date set by the impartial hearing officer which closes the period during which the parties may submit further evidence into the record or the date the impartial hearing officer receives the hearing transcript, whichever is later.

(12) Impartial hearing officer (IHO)--Individual who is selected on a random basis and is appointed by the commissioner to hear a formal appeal pursuant to these rules. The IHO is selected from a pool of qualified persons identified jointly by TRC and by members of the Rehabilitation Council of Texas [~~TRAC~~].

(13) Informal appeal or review--A communication or series of communications between a client and a Commission official which seeks to resolve the client's dissatisfaction with any determination made by a vocational rehabilitation counselor or commission official concerning the furnishing or denial of services.

(14) Mediation--A voluntary process by which applicants and eligible individuals who have requested appeals may attempt resolution of disputes with TRC involving determinations affecting the provision of vocational rehabilitation services through the use of a trained mediator.

(15) Office for Administrative Hearings and Subrogation--An office of the Texas Rehabilitation Commission which provides, among other functions, administrative support to the impartial hearing officer during the formal appeal process and is the point of contact for client's questions about the administrative hearings process.

(16) Party--An individual or agency named or admitted to participate in a formal appeal before the commission.

(17) Record--The official record of a formal appeal includes all of the following: pleadings; motions; intermediate rulings; orders; evidence received or considered; statements of matters officially noticed; questions and offers of proof; objections and rulings on objections; the IHO decision; any other decision, opinion, or report by the IHO [~~or Commissioner~~]; and all Commission memoranda or data, including client files, submitted to or considered by the IHO [~~or the Commissioner~~]. The record is maintained by the [~~Commissioner's~~] Office for Administrative Hearings and Subrogation.

(18) Regional program director--Person who reviews applicant and client appeals at the TRC Regional Office level. The person holding this position in each region is also referred to as the operations director for programs.

(19) Respondent--The Texas Rehabilitation Commission (TRC).

(20) Rule--Any written commission statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of the commission. The term includes the amendment or repeal of a prior rule, but does not include statements concerning only the internal management or organization of the commission and not affecting private rights or procedures. The term does not include certain proceedings excluded by the Act.

(21) Standard of review-- The criteria for a court to remand or overturn a final decision of the Commission. In any such action the court will receive the records relating to the hearing, will hear additional evidence at the request of a party to the action; and basing the decision of the court on the preponderance of the evidence, will grant such relief as the court determines to be appropriate. [~~The criteria for the Travis County District Court to remand or overturn a final decision of the Commissioner. The standard of review is by substantial evidence limited to the administrative record.~~]

(22) State plan--The commission is required by the Act to submit to the Department of Education a state plan covering a three-year period which describes the state's vocational rehabilitation and independent living programs and the plans and policies to be followed in carrying out those programs.

(23) Rehabilitation Council of Texas [~~Texas Rehabilitation Commission Advisory Council (TRAC)~~]--The council created [~~by Human Resources Code, Title 7, §111.016~~] in accordance with [24 TEX. REG. 1597] United States Code, Title 29, Section 725 [~~the federal Rehabilitation Act amendments of 1992, Public Law 102-569~~].

§104.3. General Provisions.

(a) General. The formal appeal and mediation process commences with the filing of a Petition for Administrative Hearing with the Office for Administrative Hearings and Subrogation. Appeals of determinations made by personnel of the commission that affect the provision of vocational rehabilitation services to applicants or eligible individuals may be made concerning:

(1) applicants for vocational rehabilitation services; and

(2) clients.

(b) [~~(a)~~] Jurisdiction.

(1) The Impartial Hearing Officer acquires jurisdiction over a case after a client files a Petition for Administrative Hearing and the IHO is appointed pursuant to these rules.

(2) A Petition for Administrative Hearing shall be considered filed on the date the Petition is received and date-stamped by the [~~Commissioner's~~] Office for Administrative Hearings and Subrogation.

(3) The IHO's authority is limited to a review of a client's dissatisfaction with the furnishing or denial of

services by personnel of the Commission [~~a rehabilitation counselor or agency official~~]. The IHO does not have authority to:

(A) change or alter [~~TRC~~] rules, policies, or procedures of the Commission;

(B) hear alleged violations of the Americans with Disabilities Act, §504 of the Act, or other federal laws; or

(C) hear or decide class actions.

(c) [~~(b)~~] Conduct and Decorum. Appropriate conduct and decorum shall be maintained and enforced by the IHO. Every party, witness, attorney, or other representative shall participate in all proceedings with proper dignity, courtesy, and respect for the Commission, the IHO, and all other parties. Attorneys and other representatives or parties shall observe and practice a high standard of ethical behavior.

(d) [~~(c)~~] Computation of Time.

(1) Unless otherwise required by law in computing any period of time prescribed or allowed by these rules, the date of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless such day is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor legal holiday. Unless specifically stated otherwise, "days" as used in these policies refer to calendar days.

(2) Unless otherwise provided by statute, the time for filing any pleading may be extended by order of the

IHO at the request of any party upon written motion duly filed with the [~~Commissioner's~~] Office for Administrative Hearings and Subrogation prior to the expiration of the applicable period of time for the filing of same. Said motion shall include a showing that there is good cause for such extension of time and that the need therefor is not caused by neglect, indifference, or lack of diligence of the movant. A copy of any such motion shall be served upon all other parties of record to the proceeding contemporaneously with the filing thereof. Any party may file written pleadings contesting a motion to extend which shall be served upon all other parties contemporaneously with the filing thereof.

(3) The date upon which a pleading or motion is filed is the date on which it is received and date-stamped by the [~~Commissioner's~~] Office for Administrative Hearings and Subrogation .

~~[(4) Unless specifically stated otherwise, "days" as used in these rules means calendar days.]~~

(e) [~~(d)~~] Appearances and right to representation. Any party may appear on his/her own behalf or may be represented by an attorney at law in good standing with the State Bar of Texas or by an authorized representative. The IHO may require any person appearing in a representative capacity to provide such evidence of his authority as the IHO may deem necessary.

~~[(e) Notice of right to formal appeal.]~~

~~[(1) Subject to the provisions of 34 Code of Federal Regulation §361.48, the commission is responsible for providing notice to all parties as required therein and by other applicable law.]~~

(f) Notification.

(1) An applicant or an eligible individual or, as appropriate, the applicant's representative or individual's representative, shall be notified of the right to obtain review of determinations described in subsection (a) of this section in an impartial due process hearing under subsection (h) of this section, and of the right to pursue mediation with respect to the determinations under §104.5(c) of this title (relating to Formal Appeal and Mediation), and of the availability of assistance from the client assistance program. Such notification shall be provided in writing at the time an individual applies for vocational rehabilitation services, and at the time the individualized plan for employment for the individual is developed, and upon reduction, suspension, or cessation of vocational rehabilitation services for the individual.

(2) The IHO shall issue notice of the date, time, and location for the hearing.

(g) Evidence and representation. An applicant or an eligible individual, or, as appropriate, the applicant's representative or individual's representative, will be provided with an opportunity to submit at the mediation session or hearing evidence and information to support the position of the applicant or eligible individual, and may be represented in the mediation session or hearing by a person selected by the applicant or eligible individual.

(h) Hearings.

(1) Hearing officer. A due process hearing shall be conducted by an impartial hearing officer who shall issue a decision based on the provisions of the approved state plan, the Rehabilitation Act if 1973, as amended (including

regulations implementing the Act), and state regulations and policies that are consistent with the Rehabilitation Act and its implementing regulations. The impartial hearing officer shall provide the decision in writing to the applicant or eligible individual, or, as appropriate, the applicant's representative or individual's representative, and to the commission.

(2) List. The commission will maintain a list of qualified impartial hearing officers who are knowledgeable in laws (including regulations) relating to the provision of vocational rehabilitation services under the Rehabilitation Act of 1973, as amended, from which hearing officers will be selected. For the purposes of maintaining such list, impartial hearing officers shall be identified [24 TEX. REG. 1598] jointly by the Commission, and by members of the Rehabilitation Council of Texas.

(3) Selection. An impartial hearing officer shall be selected to hear a particular case relating to a determination on a random basis.

(i) [~~(f)~~] Confidentiality. All personal information regarding applicants or clients in the possession of the commission must be used only for purposes directly connected with the administration of the Act. Information may not be shared with advisory or other bodies which do not have official responsibility for administration of the Act.

(j) [~~(g)~~] Testimony under oath or affirmation. In any hearing, the IHO shall administer an oath or affirmation before permitting testimony from any witness.

(k) [~~(h)~~] Class actions. Class actions are not permitted under these rules.

(l) [~~(i)~~] Reasonable accommodation. The commission shall provide reasonable accommodation to the client or other individuals with disabilities, upon request, for purposes of the appeal process as required by the Americans with Disabilities Act of 1990, 42 United States Code §12101 et seq. and the Act, §504.

(m) [~~(j)~~] Stay of official acts or services. A request for an informal or formal appeal does not of itself stay an official act of or the provision of services by the commission unless the official act or services are stayed by controlling law.

(n) [~~(k)~~] Limitations on number of witnesses. The IHO has the right in any proceeding under these rules to limit the number of witnesses whose testimony will be repetitious and to set time limits in order to exclude irrelevant, immaterial, or unduly repetitious testimony, so long as all viewpoints are given a reasonable opportunity to be heard.

(o) [~~(l)~~] Mileage and Witness fees.

(1) An individual who is not an employee of TRC and who is subpoenaed or otherwise compelled to attend any hearing or proceeding to give testimony or to produce documents is entitled to receive:

(A) mileage, in the same amount per mile as the mileage travel allowance for state employees, for traveling to and returning from the place of the hearing or the place where the deposition is taken, if the place is more than 25 miles from the individual's place of residence; and

(B) a fee of not less than $10 a day for each day or part of a day the individual is required to be present or a fee equal to the per diem and travel allowances of a state employee, if an overnight stay is required.

(2) Mileage and fees to which a witness is entitled under this rule shall be paid by the party at whose request the individual appears or at whose request the deposition is taken.

~~[(m) Continuation of services. Pursuant to the Act, pending a final decision by the IHO or the resolution of an informal or formal appeal, the commission shall not institute a suspension, reduction, or termination of services being provided under the individualized written rehabilitation program (IWRP), unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the client. In the case of a client who has completed a term of training or similar services prior to the appeal, and the next term has not yet begun (prior to the current appeal), it is understood that such training or services are not "being provided."]~~

(p) Impact on provision of services. Unless the individual with a disability so requests, or, in an appropriate case, the individual's representative so requests, pending a decision by a mediator or impartial hearing officer under subsection (h)(1) of this section or §104.6 of this title (relating to Motion for Reconsideration), the commission will not institute a suspension, reduction, or termination of services being provided for the individual, including evaluation and assessment services and plan development, unless such services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual, or the individual's representative. In the case of a client who has completed a term of training or similar services prior to the appeal, and the next term has not yet begun (prior to the current appeal), it is understood that such training or services are not "being provided."

§104.4. Informal Appeal.

(a) A client or applicant may seek an informal appeal of his/her dissatisfaction with a decision. An informal appeal consists of meetings, properly documented, with the VRC, area manager, and the regional program director, in that order.

(b) During the informal appeal process, the Commission shall maintain a file of all documentation, decisions, and actions throughout the process. The parties shall jointly agree on dates, times, and locations of meetings.

(c) An informal appeal may not be used as a means to delay a formal hearing or mediation.

(d) A client/applicant may file a petition for a formal administrative hearing at any time during the informal appeals process.

~~[(a) A client may seek a timely review of his/her dissatisfaction with a decision by the rehabilitation counselor, the area manager, and the regional program director, in that order.]~~

~~[(b) An informal appeal may not be used as a means to delay a formal appeal before an impartial hearing officer unless the parties jointly agree to a delay. The rehabilitation counselor shall immediately inform the client of his/her right to petition for a formal appeal in lieu of initiating the informal appeal process. During the informal appeal process, the commission shall maintain a file of all documentation, decisions, and actions throughout the process. The parties~~

~~shall jointly agree on the applicable dates, times, and locations for the meetings.~~]

§104.5. Formal Appeal and Mediation .

(a) The formal appeal process commences with the filing of a Petition for Administrative Hearing with the [~~Commissioner's~~] Office for Administrative Hearings and Subrogation . [~~The hearing must be held within 45 days of an individual's request for review, unless informal resolution is achieved prior to the 45th day, or the parties agree to a specific extension of time.~~]

(b) Role of [~~Commissioner's~~] Office for Administrative Hearings and Subrogation . Upon receipt of the Petition for Administrative Hearing, the [~~Commissioner's~~] Office for Administrative Hearings and Subrogation shall:

(1) acknowledge receipt of the petition for administrative hearing (via certified mail, return receipt requested) and advise the appellant of the availability of the Client Assistance Program, including the address and telephone number [~~within five days of receipt of the petition for administrative hearing~~];

(2) date-stamp the Petition and record a docket control number for the appeal;

[24 Tex. Reg. 1599] (3) select the impartial hearings officer (IHO), who is appointed by the commissioner, on a random basis from a pool of qualified persons identified jointly by TRC and the Rehabilitation Council of Texas [~~TRAC~~] in accordance with the Rehabilitation Act [~~within ten days of receipt of the Petition for Administrative Hearing and~~

~~immediately~~] and forward a copy of the Petition for Administrative Hearing to the IHO;

(4) forward a copy of the Petition for Administrative Hearing to the Office of the General Counsel, Deputy Commissioner for Rehabilitation Services and Commission Representative immediately upon receipt;

(5) provide administrative support to the IHO:

(A) serve as the custodian of records for all documents, motions, and pleadings directed to the IHO;

(B) coordinate and schedule all dates, meetings, hearings;

(C) make all necessary arrangements for the formal appeal:

(i) schedule and set up the hearing location;

(ii) if required, retain the services of a certified shorthand reporter to prepare a transcript of the proceedings;

(iii) provide any requested reasonable accommodations;

(6) compile and maintain the official record of the appeal;

(7) accompany IHO to prehearing conference, administrative hearing and provide necessary assistance during the proceedings;

~~[(8) send copies of witness lists to all parties to the hearing and to witnesses who are TRC employees.]~~

(c) Mediation. Applicants and eligible individuals who have requested appeals may agree with the Commission to attempt resolution of disputes involving determinations described in §104.3(a) of this title (relating to General Provisions) through mediation. The mediation process must be voluntary on the part of the parties. It may not be used to deny or delay the right of an individual to a hearing under §104.3(h) of this title, or to deny any other right afforded by law, and it will be conducted by a qualified and impartial mediator who is trained in effective mediation techniques. The Commission will bear the cost of the mediation process. Clients/Applicants are responsible for the cost of any attorney or other person representing him/her.

(1) List of mediators. The Commission will maintain a list of individuals who are qualified mediators and knowledgeable in laws (including regulations) relating to the provision of vocational rehabilitation services under the Rehabilitation Act of 1973, as amended, from which mediators will be selected.

(2) Scheduling. Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(3) Agreement. An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement and signed by both parties or their representatives, and the mediator.

(4) Confidentiality. Discussions that occur during the mediation process shall be confidential and may

not be used as evidence in any subsequent due process hearing or civil proceeding. The parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(d) [~~(c)~~] Impartial Hearing Officer.

(1) Qualifications. The IHO:

(A) cannot be an employee of a public agency;

(B) cannot be a member of the Rehabilitation Council of Texas [~~Texas Rehabilitation Advisory Council~~] (the Act, § 105, as amended in 1992); and

(C) must have knowledge of the delivery of vocational rehabilitation services, the state plan under the Act, §101, the federal regulations, and commission rules governing the provision of such services and training with respect to the performance of official duties;

(D) must not have been involved in previous decisions regarding the vocational rehabilitation of the applicant or client;

(E) must have no personal or financial interest that would conflict with his/her objectivity; [~~and~~]

(F) must have [~~, in addition to all of the above,~~] successfully completed impartial hearings training presented by the commission ; and [~~,~~]

(G) must not be a client of TRC.

(2) Powers and Duties.

(A) The IHO shall have the authority and duty to:

(i) conduct a full, fair, and impartial hearing;

(ii) take action to avoid unnecessary delay in the disposition of the proceeding;

(iii) maintain order; and

(iv) permit deviations from the rules and procedures prescribed in subsections (f) [~~(e)]~~-(j) of this section, except subsection (j)(4)(F) of this section , in the interest of justice or to expedite the proceedings. If prior to adjournment of a hearing either party disagrees with a ruling or otherwise so requests, the IHO shall include in the written record a justification, and an explanation of how the decision is in the interest of justice and/or reasonably necessary to expedite the proceedings. Actions taken under this subsection shall be limited to procedural matters, and no party shall lose any substantive rights.

(B) The IHO shall have the power to regulate the course of the hearing and the conduct of the parties and authorized representative(s), including the power to:

(i) administer oaths;

(ii) take testimony;

(iii) rule on questions of evidence;

(iv) rule on discovery issues;

(v) issue orders relating to hearing and prehearing matters, including orders granting permission to subpoena witnesses and imposing sanctions regarding discovery;

(vi) limit irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations;

(vii) admit or deny party status;

(viii) grant continuance(s);

[24 Tex. Reg. 1600] (ix) require parties to submit legal memoranda, proposed findings of fact, and conclusions of law;

(x) make findings of fact and conclusions of law; and

(xi) issue decisions.

(C) An IHO shall disqualify him/herself if the IHO has directly or indirectly had prior involvement with any issues that are the basis for the hearing , or if the IHO has a personal relationship or familial relationship with any party or witness .

(D) Substitution of impartial hearing officers.

(i) If for any reason an IHO is unable to continue presiding over a pending hearing or issue a decision after the conclusion of the hearing, another IHO may be designated as a substitute in accordance with applicable law and these rules.

(ii) The substitute IHO may use the existing record and need not repeat previous proceedings, but may conduct further proceedings as necessary and proper to conclude the hearing and render a decision.

(e) [~~(d)~~] Ex Parte Communications. Unless required for the disposition of ex parte matters authorized by law, the IHO may not communicate, directly or indirectly, in connection with any issue of fact or law with the commissioner or any party or a party's representative, except upon notice to all parties.

(f) [~~(e)~~] Prehearing Procedures.

(1) Prehearing Conference(s).

(A) When appropriate, the IHO may hold a prehearing conference to resolve matters preliminary to the hearing.

(B) A prehearing conference may be convened to address preliminary matters including the following listed in clauses (i)-(xv) of this subparagraph :

(i) issuance of subpoenas;

(ii) factual and legal issues;

(iii) stipulations;

(iv) clarification of the issues at the discretion of the IHO;

(v) requests for official notice;

(vi) identification and exchange of documentary evidence;

(vii) admissibility of evidence;

(viii) identification and qualification of witnesses;

(ix) motions;

(x) discovery disputes;

(xi) order of presentation;

(xii) scheduling;

(xiii) settlement conferences; [~~and~~]

(xiv) mediation; and

(xv) [~~(xiv)~~] such other matters as will promote the orderly and prompt resolution of the issues and conduct of the hearing.

(C) Among other matters, as stated in subsection (b) of this section, an IHO may order:

(i) that the parties jointly discuss the prospects of settlement or stipulations or other dispute resolution methods approved herein and be prepared to report thereon at the prehearing conference;

(ii) that the parties file and be prepared to argue preliminary motions at the prehearing conference;

(iii) that the parties be prepared to specify the controlling factual and legal issues in the case at the prehearing conference; and

(iv) that the parties make a concise statement of undisputed facts and issues at the prehearing conference.

(D) All or part of the prehearing conference may [~~will~~] be recorded or transcribed.

(E) The IHO may, after acquiring jurisdiction, issue an order requiring a prehearing "statement of the case." The parties shall [~~, within 14 days of service,~~] file a statement specifying the party's present position on any or all of the following listed in clauses (i)-(v) of this subparagraph as required by the IHO. Parties shall supplement this statement on a timely basis. The statement may [~~shall~~] include:

(i) the disputed issues or matters to be resolved;

(ii) a brief statement of the facts or arguments supporting the party's position in each disputed issue or matter;

(iii) a list of facts or exhibits to which a party will stipulate; and

(iv) a list of the witnesses which each party intends to call at the hearing, including a designation of each as either a fact or expert witness, and a brief statement summarizing the testimony and/or opinions (experts) of each witness .[~~; and~~]

~~[(v) a description of the discovery, if any, the party intends to engage in and an estimate of the time needed to complete discovery.]~~

(2) Prehearing Orders.

(A) The IHO may issue a prehearing order reciting the actions taken or to be taken with regard to any matter addressed at the prehearing conference.

(B) The prehearing order shall be a part of the hearing record.

(C) If a prehearing conference is not held, the IHO may issue a prehearing order to regulate the conduct of the proceedings of the formal hearing.

~~[(3) Settlement Conferences.]~~

~~[(A) Upon request of any party and approval by the IHO, or at the IHO's discretion, a conference outside the presence of the IHO may be held to address settlement.]~~

~~[(B) Settlement discussions shall not be made a part of the case record.]~~

~~[(C) This section is not in derogation of the agency's and the parties' ability to settle cases independently of the impartial hearing officer.]~~

(3) [~~(4)~~] Stipulations.

(A) The parties, by stipulation, may agree to any substantive or procedural matter.

[24 TEX. REG. 1601] (B) A stipulation shall be filed in writing or entered on the record at the prehearing (or hearing).

(C) The IHO may require additional development of stipulated matters.

(g) [~~(f)~~] Pleadings.

(1) In a formal appeal all pleadings, including the Petition for Administrative Hearing, shall contain:

(A) the name of the party making the pleading;

(B) the names of all other known parties;

(C) a concise statement of the facts alleged and relied upon;

(D) a statement of the type of relief, action, or order desired;

(E) any other matter required by law;

(F) a certificate of service, as required by these rules; and

(G) the signature of the party making the pleading or the party's authorized representative.

(2) Any pleading filed pursuant to a formal appeal may be amended up to 14 days prior to the hearing. Amendments filed after that time will be accepted at the discretion of the IHO.

(3) Any pleading may adopt and incorporate, by specific reference thereto, any part of any document or entry in the official files and records of the Commission. All pleadings relating to any matter pending before the Commission shall be filed with the IHO through the [~~Commissioner's~~] Office for Administrative Hearings and Subrogation .

(4) All pleadings shall be typed or printed on 8 1/2 by 11 inch paper with a one-inch margin. Reproductions are acceptable, provided all copies are clear and permanently legible.

(5) Pleadings shall contain the name, address, and telephone number of the party filing the document or the name, telephone number, and business address of the authorized representative.

(6) The party or the party's designated representative filing the pleading shall include a signed certification that a true and correct copy of the pleading has been served on every other party.

[~~(g) Discovery.~~]

[~~(1) Forms and scope of discovery.~~]

[~~(A) Discovery is the process by which a party may, prior to the hearing, obtain evidence which is relevant to the subject matter of the hearing.~~]

[~~(B) The parties are entitled to conduct the following forms of discovery:~~]

[~~(i) oral or written depositions of any party or non-party;~~]

~~[(ii) requests for admission;]~~

~~[(iii) interrogatories; and]~~

~~[(iv) requests for production or examination.]~~

~~[(C) Scope of discovery. Parties may obtain discovery regarding any matter which is relevant to the subject matter of the hearing or which is reasonably calculated to lead to the discovery of evidence which would be admissible at the hearing.]~~

~~[(D) All discovery requests should be directed to the party from which discovery is being sought.]~~

~~[(E) Copies of discovery requests and documents filed in response thereto shall be served on all parties and should not be filed with the IHO unless directed by the IHO to do so or when in support of objections, motions to compel, motions for protective orders, or motions to quash.]~~

~~[(F) All parties will be afforded a reasonable opportunity to file objections and motions to compel with the IHO regarding any and all discovery requests.]~~

~~[(2) Depositions.]~~

~~[(A) After the filing of a Petition for Administrative Hearing (TRC 505) any party may take the testimony of any person, including a party, upon oral or written examination.]~~

~~[(B) Reasonable notice must be served in writing by the party or the party's authorized representative proposing to take a deposition upon oral examination to every other party or the party's authorized representative. The notice shall state the name of the deponent, the time and the place of the taking of the deposition, and if the production of documents or tangible things is desired, a designation of the items to be produced by the deponent which describes each item with reasonable particularity. The notice shall also state the identity of persons who will attend other than the witness, parties, authorized representatives and their employees, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons.]~~

~~[(C) When the deponent is a party, notice proposing to take a deposition served upon the party or the party's authorized representative shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice which is served upon the party or the party's authorized representative shall have the same effect as a subpoena served on the deponent. A party or a party's agents, employees, or persons subject to that party's control may be compelled to produce designated documents or tangible things if the notice sets forth the individual items or categories of items to be produced with reasonable particularity.]~~

~~[(D) After the filing of a petition for administrative hearing (TRC-505), any party may take the testimony of any person, including a party, by deposition upon written questions. A party proposing to take depositions upon written questions shall serve them upon every other party or the party's authorized representative~~

~~with written notice 10 days before the deposition is to be taken. The notice shall state the name and address of the deponent, the hearing in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things is desired, a designation of the items to be produced by the deponent which describes each item with reasonable particularity.~~]

[~~(E) Any party may subpoena an individual who is not a party in order to take the testimony of that person upon oral or written examination. The procedure for issuance of subpoenas is set out at paragraph (6) of this subsection.~~]

[~~(F) Upon proof of service of a notice to take a deposition, written or oral, any officer authorized to take depositions and any certified shorthand reporter shall immediately issue and cause to be served upon the witness a subpoena directing him to appear~~ [24 TEX. REG. 1602] ~~before the officer at the time and place stated in the notice for the purpose of giving a deposition.~~]

[~~(G) A witness may be compelled by subpoena duces tecum to produce books, papers, documents, or tangible things within his care, custody or control. The subpoena duces tecum shall direct with particularity the witness to produce, at such time and place designated, documents or tangible things which constitute or contain evidence or information relating to any of the matters within the scope of the hearing.~~]

[~~(3) Requests for Admission.~~]

[~~(A) At any time after filing of the petition for administrative hearing, a party may serve upon any other~~

~~party a written request for the admission, for purposes of the pending hearing only, of the truth of any matters within the scope of these rules set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.]~~

~~[(B) Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an authorized representative, service of a request for admissions shall be made on the party's representative. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof, shall be filed promptly with the Commissioner's Office for Administrative Hearings.]~~

~~[(C) Each matter to which an admission is requested shall be separately set forth. The matter is admitted without necessity of an order unless, within 30 days after service of the request, or within such time as the IHO may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's representative. If objection is made, the reason therefor shall be stated.]~~

~~[(D) The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not~~

~~give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny.]~~

~~[(E) The IHO may permit withdrawal or amendment of responses and deemed admissions upon a showing of good cause for such withdrawal or amendment if the IHO finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby. Any admission made by a party under this rule is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may be used against that party in any other proceeding.]~~

~~[(4) Interrogatories.]~~

~~[(A) Any party may serve upon any other party written interrogatories to be answered by the party served, or the party's authorized representative.]~~

~~[(B) When a party has designated an authorized representative, service of interrogatories and answers to interrogatories shall be made on the representative.]~~

~~[(C) Interrogatories may relate to any matters which are relevant to the subject matter of the hearing, but the answers, subject to any objections as to relevance, may be used only against the party answering the interrogatories.]~~

~~[(D) The party upon whom the interrogatories have been served shall serve answers on the party submitting the interrogatories within the time specified~~

~~by the party serving the interrogatories, which specified time shall not be less than 30 days after the service of the interrogatories. The IHO, on motion and notice for good cause shown, may enlarge or shorten the time for serving answers or objections.]~~

~~[(E) The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than 30 answers. No more than two sets of interrogatories may be served by a party to any other party except by agreement or as permitted by the IHO.]~~

~~[(5) Requests for production or examination.]~~

~~[(A) Any party may serve on any other party a request to produce and permit the requesting party or the party's authorized representative to inspect or copy any designated documents which are relevant to the subject matter of the hearing and which are in the possession, custody, or control of the party to whom the request is directed.]~~

~~[(B) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner for making the inspection and performing the related acts.]~~

~~[(C) The party upon whom the request is served shall serve a written response which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the request, except only to the extent that he makes objections in writing to particular items,~~

~~or categories of items, stating specific reasons why such discovery should not be allowed.]~~

~~[(D) A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.]~~

~~[(E) The request shall be served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request. The time for making a response may be shortened or lengthened by the IHO upon a showing of good cause.]~~

~~[(6) Subpoenas.]~~

~~[(A) Any party may subpoena a witness for the purposes of taking their deposition by oral or written examination or to compel testimony at the hearing.]~~

~~[(B) A party may not obtain a subpoena without having petitioned the IHO for an order granting the issuance of a subpoena upon a showing of good cause as to the need for the subpoena.]~~

[24 Tex. Reg. 1603] ~~[(C) Upon a finding that good cause exists for the issuing of a subpoena, the IHO may enter an order granting the issuance of a subpoena.]~~

~~[(D) The party seeking the subpoena must then present the IHO order granting the issuance of a subpoena to a certified shorthand reporter or any officer authorized to issue subpoenas who shall immediately issue and cause to be served upon the witness a subpoena directing him to appear at the time and place stated in the order.]~~

~~[(E) All costs associated with the issuing of a subpoena are to be borne by the requesting party.]~~

~~[(F) The form of the subpoena and the service thereof shall be in conformance with the rules applicable to subpoenas in Texas Courts.]~~

~~[(G) If the witness fails to comply with the subpoena, the party requesting the subpoena may bring suit to enforce the subpoena in a district court either in Travis County or in the county in which the subject hearing will be held.]~~

~~[(7) Compelling Discovery.]~~

~~[(A) In the event of a discovery dispute, a party, upon reasonable notice to all other parties, may file a motion to compel or file a motion for protective order with the IHO. Such motions shall contain a sworn certificate by the party filing the motion that efforts to resolve the discovery dispute without the necessity of IHO intervention were attempted and failed.]~~

~~[(B) At the IHO's discretion, an order compelling discovery or a protective order may be issued to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. The IHO's authority extends to but is not limited by any of the following:]~~

~~[(i) ordering that requested discovery be answered or produced;]~~

~~[(ii) ordering that the requested discovery not be sought in whole or in part, that the extent or~~

~~subject matter of discovery be limited, or that it not be undertaken at the time or place specified;]~~

~~[(iii) ordering that the discovery be undertaken only by such method, upon such terms and conditions, or at the time and place directed by the IHO; and]~~

~~[(iv) ordering that, for good cause shown, results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted.]~~

~~[(C) Sanctions.]~~

~~[(i) When a party does not comply with the IHO order compelling discovery, the requesting party may, upon reasonable notice to all other parties, apply to the IHO for sanctions. A party may not request sanctions without having first obtained an order compelling discovery.]~~

~~[(ii) If a party, or an officer, director, or an authorized representative of a party, fails to comply with an order compelling discovery, the IHO may, after opportunity for hearing, make orders in response to such failure, including any of the following:]~~

~~[(I) preventing the disobedient party from further discovery of any kind, or of a particular kind;]~~

~~[(II) deeming any facts pertaining to the order, or any other facts, to be established, as claimed by the moving party;]~~

~~[(III) disallowing the disobedient party from supporting or opposing designated claims or defenses, or prohibiting the party from introducing designated matters into evidence; and]~~

~~[(IV) striking pleadings or parts of pleadings, staying further action until the order is obeyed, or dismissing the proceeding with or without prejudice.]~~

~~[(iii) The IHO may impose any of the sanctions listed above on a party who abuses the discovery process in seeking or resisting discovery or who files a request, response, or answer that is frivolous, oppressive, or made for the purpose of delay.]~~

~~[(iv) A party who fails to respond to or fails to supplement a response to a discovery request may not present evidence that the party was under a duty to provide in a response or supplemental response, and may not offer the testimony of an expert witness or of any other person having knowledge of the discoverable matter, unless the IHO finds good cause to permit the evidence despite the noncompliance. The burden of establishing good cause is upon the party offering the evidence, and good cause must be shown in the record.]~~

~~[(v) Unless permitted by law, party representatives shall not communicate with the IHO or the commissioner without the knowledge of all other parties. (The IHO may impose sanctions for impermissible communications.)]~~

~~[(vi) The IHO shall state the specific basis for any sanction in the record or in a written order. A sanctioned party has the right to appeal the sanction to the commissioner.]~~

(h) Dismissal. After giving notice and hearing, the IHO may upon the motion of any party or the IHO's own motion, dismiss the appeal upon showing of any one of the following: [~~Dismissal without Hearing.~~]

[~~(1) The IHO may entertain motions for dismissal without a hearing for the following reasons:~~]

(1) [~~(A)~~] failure to prosecute;

(2) [~~(B)~~] unnecessary duplication of proceedings or res judicata;

(3) [~~(C)~~] withdrawal;

(4) [~~(D)~~] moot questions;

(5) [~~(E)~~] lack of jurisdiction;

(6) [~~(F)~~] failure to raise a material issue in the pleading;

(7) [~~(G)~~] failure of a party to appear at a scheduled hearing.

[~~(2) If the IHO finds that such motion should be granted the IHO will so order, and the commissioner may enter a final order of dismissal.~~]

(i) Motions.

(1) Unless otherwise provided by these rules, the following listed in subparagraphs (A)-(I) of this paragraph shall apply.

(A) A party may move for appropriate relief before or during a hearing.

(B) A party shall submit all motions in writing or orally at a hearing.

[24 TEX. REG. 1604] (C) Written motions shall:

(i) be filed no later than 15 days before the date of the hearing, except where good cause is stated in the motion, the IHO may permit a written motion subsequent to that time;

(ii) state concisely the question to be determined;

(iii) be accompanied by any necessary supporting documentation; and

(iv) be served on each party.

(D) An answer to a written motion shall be filed on the earlier of:

(i) seven days after receipt of the motion; or

(ii) on the date of the hearing.

(E) On written notice to all parties or with telephone consent of all parties, the IHO may schedule a conference to consider a written motion.

(F) The IHO may reserve ruling on a motion until after the hearing.

(G) The IHO may issue a written decision or state the decision on the record.

(H) If a ruling on a motion is reserved, the ruling shall be in writing and may be included in the IHO's decision.

(I) The filing or pendency of a motion does not alter or extend any time limit otherwise established by these rules.

(2) Continuance(s) may be granted by the IHO in accordance with applicable law. Motions for continuances shall be in writing or stated in the record and shall set forth the specific grounds upon which the party seeks the continuance.

(3) Unless made during a prehearing or hearing, a party seeking a continuance, cancellation of a scheduled proceeding, or extension of an established deadline must file such motion no later than 10 days before the date or deadline in question. A motion filed less than 10 days before the date or deadline in question must contain a certification that the movant contacted the other party(ies) and whether or not it is opposed by any party(ies). Further, if a continuance to a certain date is sought, the motion must include a proposed date or dates and must indicate whether the party(ies) contacted agree on the proposed new date(s).

(j) Hearing.

(1) The IHO shall set the date and time for the hearing. [~~The hearing must take place within 45 days of the request unless additional time is granted as authorized by law.~~] The location shall be the Commission's regional or area

office nearest the Appellant's residence or as agreed to by the parties.

(2) Order of procedure at the hearing.

(A) The appellant may state briefly the nature of the claim or defense, what the appellant expects to prove, and the relief sought. Immediately thereafter, the respondent may make a similar statement, and any other parties will be afforded similar rights as determined by the IHO. Each party is allowed 10 minutes for such statement.

(B) Evidence shall then be introduced by the appellant. The respondent and any other parties shall have the opportunity to cross-examine each of the appellant's witnesses.

(C) Cross-examination is not limited solely to matters raised on direct examination. Parties are entitled to redirect and recross-examination.

(D) Unless the statement has already been made, the respondent may briefly state the nature of the claim or defense, what the respondent expects to prove, and the relief sought.

(E) Evidence, if any, shall be introduced by the respondent. The appellant and any other parties shall have the opportunity to cross-examine each of the respondent's witnesses.

(F) Any other parties may make statements and introduce evidence. The appellant and respondent shall have opportunity to cross-examine the other parties' witnesses.

(G) The parties may present rebuttal evidence.

(H) The parties may be allowed closing statements at the discretion of the IHO.

(I) The IHO may permit deviations from this order of procedure in the interest of justice or to expedite the proceedings.

(J) Parties shall provide four copies of each exhibit offered.

(3) No evidence shall be admitted which is irrelevant, immaterial, or unduly repetitious.

(4) Documentary evidence and official notice.

(A) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. On request, parties shall be given an opportunity to compare the original and the copy or excerpts.

(B) When numerous similar documents which are otherwise admissible are offered into evidence, the IHO may limit the documents received to those which are typical and representative. The IHO may also require that an abstract of relevant data from the documents be presented in the form of an exhibit, provided that all parties of record or their representatives be given the right to examine the documents from which such abstracts were made.

(C) The following laws, rules, regulations, and policies listed in clauses (i)-(vi) of this subparagraph are officially noticed:

(i) the Rehabilitation Act of 1973, as amended, 29 United States Code, §701 et seq.;

(ii) Department of Education regulations, 34 Code of Federal Regulations, Part 361 [~~§361.48~~];

(iii) Texas Human Resources Code, Title 7, §111 et seq.;

(iv) TRC State Plan for Vocational Rehabilitation Services;

(v) TRC Rehabilitation Services Manual; and

(vi) TRC Administrative Policies and Procedures Manual.

[~~(D) Prepared testimony. In all proceedings and after service of copies upon all parties of record at such time as may be designated by the IHO, the prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be incorporated in the record as if read or received as an exhibit, upon the witness's being sworn and identifying the same.~~ [24 TEX. REG. 1605] ~~Such witness shall be subject to cross-examination and the prepared testimony shall be subject to a motion to strike in whole or in part.~~]

(D) [~~(E)~~] Exhibits.

(i) Exhibits shall not exceed 8 1/2 by 11 inches (unless they are folded to that size). Maps, drawings, and other exhibits which are not the required size shall be rolled or folded so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(ii) Exhibits shall be limited to facts material and relevant to the issues involved in a particular proceeding.

(iii) The original of each exhibit offered shall be tendered to the court reporter for identification.

(iv) In the event an exhibit has been identified, objected to, and excluded, the IHO shall determine whether or not the party offering the exhibit withdraws the offer, and, if so, permit the return of the exhibit. If the excluded exhibit is not withdrawn it shall be given an exhibit number for identification, shall be endorsed by the IHO with a ruling, and shall be included in the record for the only purpose of preserving the exception.

(E) [~~(F)~~] Offer of proof. When testimony on direct examination is excluded by ruling of the IHO, the party offering such evidence shall be permitted to make an offer of proof by dictating or submitting in writing the substance of the proposed testimony prior to the conclusion of the hearing. [~~Such offer of proof shall be sufficient to preserve the point for review by the commissioner.~~] The IHO may ask such questions of the witness as deemed necessary to satisfy that the witness would testify as represented in the offer of proof. [~~An alleged error in sustaining an objection to questions asked on cross examination may be preserved without making an offer of proof.~~]

(5) Failure to attend hearing and default. If, after receiving notice of a hearing, a party fails to attend a hearing, the IHO may proceed in that party's absence and,

where appropriate, may issue a decision against the defaulting party.

(k) *Impartial Hearing Officer Decision.*

(1) Within 30 days of the hearing completion date, the IHO shall issue an opinion based on the provisions of the approved State plan, the applicable regulations, and the Act which shall contain separately stated:

(A) findings of fact;

(B) conclusions of law; and

(C) opinion.

(2) The [~~Commissioner's~~] Office for Administrative Hearings and Subrogation shall submit the IHO opinion to the Commissioner with a copy to each party.

§104.6. Motion for Reconsideration [~~Action by the Commissioner~~].

Either party to a hearing may file a motion for reconsideration with the Office for Administrative Hearings and Subrogation within 15 days after issuance of the decision of the impartial hearing officer. The motion for reconsideration must specify the matters in the decision of the impartial hearing officer which the party considers to be erroneous. The impartial hearing officer shall rule on the motion for reconsideration no later than 10 days after receipt of the motion. If the motion is granted, the IHO shall issue a decision upon reconsideration within an additional 15 days. If the impartial hearing officer fails to rule on the motion for reconsideration within 10 days, the motion is denied as a matter of law.

~~[(a) The Commissioner cannot delegate the responsibility for making any final Commission order to any other officer or employee of the Commission.]~~

~~[(b) Within 20 days of the mailing of the IHO's opinion the Commissioner will decide whether or not to formally review the IHO opinion by studying the opinion and the official case record. The Commissioner shall notify the appellant in writing of his or her intent to review within 20 days of the mailing of the IHO opinion.]~~

~~[(1) If the Commissioner fails to provide the required written notice, the IHO opinion is final.]~~

~~[(2) If the Commissioner decides not to formally review the IHO's opinion, the opinion of the IHO becomes final. In that case, the Commissioner will issue an order making the opinion of the IHO final.]~~

~~[(3) If the Commissioner decides to formally review the IHO's opinion, the Commissioner will issue an order to that effect and written notice of this order will be sent to the Appellant by certified mail, return receipt requested.]~~

~~[(4) The parties will then have 15 days in which to submit any additional relevant evidence. The 15-day period begins on the date of the order that informs the parties that the Commissioner will review the opinion of the IHO.]~~

~~[(5) Within 30 days of the mailing of the Commissioner's order to review the IHO's opinion the Commissioner shall issue a final order and provide a full report to all parties in writing of the reasons for the order including findings of fact and conclusions of law separately stated.]~~

~~[(c) The Commissioner's order reviewing the IHO's opinion will be based on the following standards of review.]~~

~~[(1) The Commissioner may not overturn or modify an opinion of an IHO, or part of an opinion that supports the position of the Appellant unless the Commissioner concludes, based on clear and convincing evidence, that the opinion of the IHO is clearly erroneous on the basis of being contrary to federal or state law, including policy.]~~

~~[(2) Review shall include all applicable laws, rules, regulations, policies, and procedures.]~~

~~[(3) Review may be made on all questions of law, fact, and written policy and procedure.]~~

~~[(4) The review may result in affirming the opinion of the IHO in whole or in part or reversing or remanding the case to the IHO for further proceedings.]~~

~~[(5) The review may result in reversing or remanding the opinion of the IHO when the record of the hearing or opinion contains any one or more of the following, and the opinion is found to be:]~~

~~[(A) in violation of constitutional, statutory, regulatory, or written policy provisions;]~~

~~[(B) in excess of the statutory authority of the commission;]~~

~~[(C) made upon unlawful procedure;]~~

~~[(D) affected by other error of law, regulation, or written policy;]~~

~~[(E) not reasonably supported by the evidence; or]~~

~~[(F) arbitrary, capricious, or characterized by abuse of or clearly unwarranted exercise of discretion.]~~

[24 TEX. REG. 1606]~~[(6) When none of the conditions in paragraph (5) of this subsection are present in the record of the hearing or the opinion, an order affirming the opinion of the IHO shall be issued.]~~

§104.7. Finality of the Decision of the Commission [~~Motions for Rehearing~~].

The decision of the impartial hearing officer under §104.6 of this title (relating to Motion for Reconsideration) is the final decision of the Commission. A decision dismissing the case under §104.3(h)(1) of this title (relating to General Provisions) or §104.5(j)(5) of this title (relating to Formal Appeal and Mediation) becomes the final decision of the Commission if a timely motion for reconsideration is not filed.

~~[(a) A motion for rehearing is prerequisite to a judicial appeal. A motion for rehearing must be filed by a party within 20 days after the date the party receives notice of the commissioner's final decision or order.]~~

~~[(b) Replies to a motion for rehearing must be filed with the commission within 15 days after the date the motion for rehearing is filed.]~~

~~[(c) Commission action on the motion for rehearing must be taken within 30 days of receipt of the motion for rehearing. If agency action is not taken within the 30-day period, the motion for rehearing is overruled by operation of~~

~~law 30 days after the date the motion for rehearing is received by the commission.]~~

~~[(d) The commission may, by written order, extend the period of time for filing the motions and replies and taking agency action, except that an extension may not extend the period for commission action beyond 90 days after the motion for rehearing is received by the commission.]~~

~~[(e) In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the motion for rehearing is received by the commission.]~~

§104.7. Civil Action/Judicial Review [~~Judicial Review of Final Order~~].

(a) General. Any party aggrieved by a final decision of an impartial hearing officer may bring a civil action for review of such decision. The action may be brought in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy. In any such action the court will receive the records relating to the hearing, will hear additional evidence at the request of a party to the action; and basing the decision of the court on the preponderance of the evidence, will grant such relief as the court determines to be appropriate.

(b) Exhaustion of administrative remedies, including a Motion for Reconsideration, is a prerequisite to judicial review.

(c) A party seeking judicial review of the final Commission decision shall commence his civil action no later than 30 days after the date of the final decision.

(d) Implementation. If a party brings a civil action to challenge a final decision of a hearing officer under §104.3(h)(1) of this title (relating to General Provisions) or §104.6 of this title (relating to Motion for Reconsideration), the final decision involved shall be implemented pending review by the court. [~~Pursuant to these rules and 29 United States Code §722(e)(5)(J) the district courts of Travis County, Texas, have jurisdiction to hear appeals of final orders of the Commission. The standard of review will be by substantial evidence. A party may seek judicial review of the final order of the Commission by appealing to the Travis County District Courts within 30 days of receipt of notice that a party's motion for rehearing has been overruled.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on February 22, 1999.

TRD-9901083
Charles Schiesser
Chief of Staff
Texas Rehabilitation Commission
Earliest possible date of adoption: April 4, 1999

* * *

TEXAS REGISTER

ISSUE: Volume 24, Number 16

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SUBJECT: ADOPTED RULES

24 TEX. REG. 3110

TEXAS ADMINISTRATIVE CODE CITATION: 40 TAC §§ 104.1-104.8

[24 TEX. REG. 3110]

Part II. Texas Rehabilitation Commission

Chapter 104. Informal Appeals, Formal Appeals, and Mediation by Applicants/Clients of Determinations by Agency Personnel that Affect the Provision of Vocational Rehabilitation Services

40 TAC §§104.1-104.8

The Texas Rehabilitation Commission (TRC) adopts amendments to §§104.1-104.8, concerning informal appeals, formal appeals, and mediation by applicants/clients of determinations by agency personnel that affect the provision of vocational rehabilitation services. Section 104.6 is adopted with changes to the proposed text as published in the March 5, 1999, issue of the *Texas Register* (24 TEX. REG. 1595). Sections 104.1-104.5, 104.7, and 104.8 are adopted without changes and will not be republished.

The sections are being amended to conform the rules to the 1998 amendments to the Rehabilitation Act of 1973, 29 U.S.C. §§701 et seq.

One comment was received from the Rehabilitation Council of Texas recommending that, if possible, time limits should be [24 TEX. REG. 3111] reinstated under §104.5(a), (b)(1) and (3). We are leaving out the time limits because there are no time limits in the amended statute, and the introduction of new mediation procedures in the statute make it impractical to attempt to adhere in every case to the time limits specified in the old rule.

Another comment was received from Advocacy, Inc., recommending a change in terminology relating to a decision by an impartial mediator in §104.3(p). We are not adopting the change in terminology in order that it remain consistent with the terminology used in the amended statute.

The amendments are adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

§104.6.Motion for Reconsideration.

Either party to a hearing may file a motion for reconsideration with the Office for Administrative Hearings and Subrogation within 15 days after issuance of the decision of the impartial hearing officer. The motion for reconsideration must specify the matters in the decision of the impartial hearing officer which the party considers to be erroneous. Any response to the motion for reconsideration must be filed no later than 7 days after service of the motion. The impartial hearing officer shall rule on the motion for reconsideration no later than 15 days after receipt of the motion. If the motion is granted, the IHO shall issue a decision upon reconsideration within an additional 15 days. If the impartial hearing officer fails to rule on the motion for reconsideration within 15 days, the motion is denied as a matter of law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 5, 1999.

TRD-9901083
Charles Schiesser
Chief of Staff
Texas Rehabilitation Commission
Effective date: April 25, 1999
Proposal Publication date: March 5, 1999
For further information, please call: (512) 424-4050

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No. 06-1720

IN THE SUPREME COURT OF THE UNITED STATES

LOUISE ELIZABETH HURST,
Petitioner

v.

TEXAS DEPARTMENT OF ASSISTIVE
AND REHABILITATIVE SERVICES, *ET AL.*,
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case involves the appeal of an individual under the federal Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq*., of the denial of services she requested from the Department of Assistive and Rehabilitative Services, the state agency delegated the authority to administer this federal program for the State of Texas. The federal district court held that the State of Texas had not waived its immunity under the Eleventh Amendment of the United States Constitution with respect to Title I of the Rehabilitation Act. *Hurst v. Texas Dep't of Assistive & Rehab. Serv.*, 392 F.Supp.2d 794 (W.D. Tex. 2005). This decision was affirmed by the U.S. Court of Appeals for the Fifth Circuit. *Hurst v. Texas Dep't of Assistive & Rehab. Serv.*, 482 F.3d 809 (5th Cir. 2007).

This case presents the following question:

Does Title I of the Rehabilitation Act contain a clear statement of the intent of Congress to require a state to waive its immunity under the Eleventh Amendment to the United States Constitution in order to receive federal funding for programs authorized by the Act?

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BRIEF IN OPPOSITION

The District Court dismissed this case because it found that the State of Texas had not waived its immunity under the Eleventh Amendment to the U.S. Constitution. The Eleventh Amendment prohibits suits by a citizen of a state or another state or foreign country against a state in federal court. There are exceptions to this limitation, but in order for Congress to create an exception, it must provide a "clear statement" of its intent to create an exception. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Congress has the power to directly abrogate this immunity under the Fourteenth Amendment, but for a program under the Spending Clause of Article I of the U.S. Constitution, a state must agree voluntarily to waive its immunity from suit. A part of that voluntary waiver is the requirement of a clear statement of intent to waive immunity in the law.

This lawsuit is brought under Title I, § 102 of the Rehabilitation Act of 1973, as amended. 29 U.S.C. § 722(c)(5)(J)(i). This provision does not provide the clear statement required to have an effective waiver of Eleventh Amendment immunity. In fact, contrary to Petitioner's assertion, this Court considered language that is nearly identical to this provision and determined that it did not meet this requirement. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989).

Ms. Hurst substantially relies on the decision of the Court of Appeals for the Fifth Circuit in *AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636 (5th Cir. 2001), but that case is distinguishable from the current one. The federal Telecommunications Act preempted state regulation of telecommunications, allowing only a limited role for states as arbiters of disputes in a free market industry. The Telecommunications Act prohibits appeals to state courts, leaving the federal courts as the only avenue of appeal. The Texas Department of Assistance and Rehabilitative Services (DARS), on the other hand, is the state agency that fully administers this rehabilitation program and is responsible for all services to be delivered to consumers such as Ms. Hurst. The appropriate precedent in the Fifth Circuit is *Pace v. Bogalusa City School Bd.*, 403 F.3d 272 (5th Cir. 2005), and that case supports the decision in this case.

The Court of Appeals also found that the State of Texas has not waived its Eleventh Amendment immunity through the adoption of administrative rules or state statutes. DARS does not have the authority to waive this immunity, because the Texas Legislature has specifically reserved this power to itself. TEX. GOV'T CODE § 311.034. Further, no act of the Texas Legislature provides the unequivocal statement necessary to waive Eleventh Amendment immunity.

STATEMENT OF THE CASE

Ms. Hurst became a client of the Texas Rehabilitation Commission, the predecessor agency to Respondent DARS, in the spring of 2002. She sought medical assistance for an anomaly in her cervical spine. Ms. Hurst was examined by two neurosurgeons and her final diagnosis called for what the agency considered exploratory surgery. The agency determined that this treatment was outside the scope of services authorized in this program. Ms. Hurst requested an administrative hearing to review this decision. A hearing was held in September 2003 and the hearing officer upheld the decision of the staff that the requested services could not be provided under the policy of the agency. That decision became final on October 24, 2003.

Following the adverse decision in the administrative hearing at the agency, Ms. Hurst brought this suit in the U.S. District Court. DARS filed a Motion to Dismiss based on Eleventh Amendment immunity that was granted by the District Court. *Hurst v. Texas Dep't of Assistive & Rehab. Serv.*, 392 F.Supp.2d 794 (W.D. Tex. 2005). The Court of Appeals affirmed the decision, holding as follows:

> Section 102 of the Rehabilitation Act does not contain the necessary "clear-statement" requiring a waiver of Eleventh Amendment immunity if the State of Texas accepts federal funds for this program. Neither has Texas voluntarily waived its Eleventh Amendment immunity for this program. We, therefore, affirm the judgment of the district court dismissing this suit.

Hurst v. Texas Dep't of Assistive & Rehab. Serv., 482 F.3d 809, 814 (5th Cir. 2007).

REASONS FOR DENYING THE PETITION

Ms. Hurst's petition attempts to take the settled law of this Court and turn it on its head. The "clear statement" test has been consistently applied in Eleventh Amendment cases, whether based on the Fourteenth Amendment or the Spending Clause, for at least twenty years, since *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). The test has been applied in other cases involving the balance of powers between the states and the federal government for many years before that. *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981); *United States v. Bass*, 404 U.S. 336 (1971); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Contrary to the Petition of Ms. Hurst, the decision of the Court of Appeals is consistent with the decisions of this Court on the Eleventh Amendment. It is the reversal of the decision of the Court below that would introduce uncertainty into this area of jurisprudence.

I. THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS ON THE ISSUE IN THIS CASE.

Ms. Hurst has alleged that the petition should be granted because "differing approaches among the lower courts could create inconsistency among the circuits." Petition at 6. DARS wants to clarify that whatever potential there may be for conflict, there are no current conflicts existing among the Circuits that would justify granting the petition.

Ms. Hurst cites *Diamond v. Michigan*, 431 F.3d 262 (6th Cir. 2005) and *Reaves v. Missouri Dept. Of Elem and Second. Educ.*, 422 F.3d 675 (8th Cir. 2005) in support of this proposition. A review of these decisions shows that neither

Court of Appeals addressed the issue of Eleventh Amendment immunity, nor did the district courts prior to those appeals. It is difficult to find a conflict between these decisions and the lower Court here when the issue was not addressed at all. If the states of Michigan and Missouri did not raise the issue of Eleventh Amendment immunity, it was waived. "[A] State's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity, [citations omitted]." *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002).

Where there is a conflict in decisions among the Circuits, it is appropriate for this Court to grant certiorari. *Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp.*, 350 U.S. 124 (1956). There are few published decisions that address the opposite situation, where the Court determined affirmatively that there was not a conflict and denied the grant of certiorari. One such case was *Bunting v. Mellen*, 541 U.S. 1019 (2004). In that case, the majority examined three Court of Appeals decisions on sponsorship of nondenominational prayer at state colleges and rejected grant of the writ due to "the absence of a direct conflict among the Circuits." *Id.* at 1021.

There is no conflict among the Circuits and therefore no basis for the Court to consider granting certiorari. The possibility of a future conflict is not a basis for certiorari. As former Chief Justice Rehnquist stated, "[W]e must never forget that this Court is not a forum for the correction of errors." *Boag v. MacDougall*, 454 U.S. 364, 367-368 (1982) (dissenting opinion).

II. THE STANDARD FOR WAIVER OF ELEVENTH AMENDMENT IMMUNITY.

The Eleventh Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. AMEND. XI. Generally, the Eleventh Amendment prevents individual citizens from suing a non-consenting state in federal court. Congress has limited power to abrogate the Eleventh Amendment immunity, and the Court must answer two questions to determine whether a particular law allows such a suit. First, Congress must unequivocally express its intent to abrogate that immunity; and second, if it did, Congress must act pursuant to a valid grant of constitutional authority. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242. Congress does not have the power to abrogate the Eleventh Amendment under Article I of the U.S. Constitution, but does have that power under § 5 of the 14th Amendment. *Id.*

In order to waive immunity under the Spending Clause, U.S. Const. Art. I, § 8, cl. 1, a state must voluntarily waive this immunity. Under this theory, a State must have a real choice and voluntarily agree to federally imposed conditions in order to receive federal funds, including waiver of Eleventh Amendment immunity. Not all such conditioned waivers are valid, however, and this Court has established a test for these waivers:

> (1) Federal expenditures must benefit the general welfare;
> (2) The conditions imposed on the recipients must be unambiguous;
> (3) The conditions must be reasonably related to the purpose of the expenditure;
> (4) No condition may violate any independent constitutional prohibition; and
> (5) The condition may not be coercive.

South Dakota v. Dole, 483 U.S. 203, 207-211 (1987).

DARS does not dispute that all but the second requirement of the *Dole* test are satisfied. DARS is in agreement with the lower courts that the statute here lacks a clear statement of intent to condition funding on a voluntary waiver of Eleventh Amendment immunity.

III. SECTION 102 OF THE REHABILITATION ACT DOES NOT PROVIDE A CLEAR STATEMENT OF INTENT TO REQUIRE A WAIVER OF ELEVENTH AMENDMENT IMMUNITY IN ORDER TO RECEIVE FEDERAL FUNDS.

Ms. Hurst complains of the Court of Appeals' decision that Section 102 of the Rehabilitation Act does not provide a basis for jurisdiction in federal court. This case turns largely on the question of whether 29 U.S.C. § 722(c)(5)(J)(i) provides a clear statement of intent to waive the Eleventh Amendment immunity of the states. The statute provides as follows:

> § 722. Eligibility and individualized plan for employment. ***
>
> (c) Procedures ***
>
> (5) Hearings. ***
>
> (J) Civil action.
>
> (i) In general. Any party aggrieved by a final decision described in subparagraph (I), may bring a civil action for review of such decision. The action may be brought in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

Section 722 was originally adopted as § 102 of the Rehabilitation Act of 1973. Act of Sept. 26, 1973, Pub.L. 93-112, Title I, § 102, 87 Stat. 368. Following the 1986 amendments to the Act (Act of Oct. 21, 1986, Pub.L. 99-506, Title II, § 203, 100 Stat. 1815.), several courts found that there was no private right of action to appeal the administrative determination of the benefits due under the Act. *See Johnson-Lloyd v. Vocational Rehabilitation Office*, 813 F.Supp. 1120, 1123-24 (E.D. Pa. 1993); *McGuire v. Switzer*, 734 F.Supp. 99, 111 & n. 11 (S.D.N.Y. 1990); *Ryans v. New Jersey Comm'n for the Blind and Visually Impaired*, 542 F.Supp. 841, 845-46 (D.N.J. 1982); *Jones v. Illinois Dep't of Rehabilitation Servs.*, 504 F.Supp. 1244, 1249-51 (N.D. Ill. 1981), aff'd, 689 F.2d 724 (7th Cir. 1982).

In 1998, Congress again amended the Act and provided for a private right of action in either state or federal court. This amendment included the language at issue here, 29 U.S.C. § 722 (c)(5)(J)(i).

The title of 29 U.S.C. § 722 is "Eligibility and individualized plan for employment." This section of the Act is a part of a program to provide benefits to individuals with disabilities through federal grants to enable the individuals to become gainfully employed. It is a welfare program, authorized by the Spending Clause, U.S. CONST. Art. I, § 8, cl. 1:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties; Imposts and Excises shall be uniform throughout the United States.

As noted above, § 722 was amended in 1998 in reaction to holdings of courts that there was no private right of action to appeal an administrative determination on eligibility for services. There is no evidence of intent to link acceptance of federal funds with a waiver of Eleventh Amendment immunity under this provision, and, accordingly, there has been no waiver of Eleventh Amendment immunity for 29 U.S.C. § 722 by acceptance of federal funds. There is no mention of Eleventh Amendment immunity in this provision.

As this Court points out, "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain'." *Arlington Cent. School Dist. Bd. of Ed. v. Murphy*, 548 U.S. __, 126 S.Ct. 2455, 2459 (2006), citing *Pennhurst*, 451 U.S. at 17. In *Murphy*, the Court held that a provision that a court may "award reasonable attorneys' fees as part of the costs" to a prevailing parent in an Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3)(B) case was not clear enough to allow the court to also award cost of expert witness fees. *Id.* Waivers of immunity must be stated, not implied.

While cases dealing with abrogation of Eleventh Amendment Immunity under the Fourteenth Amendment are usually distinct from Spending Clause cases, this Court has recognized that the "clear statement" test applied to Congressional enactments is the same for both purposes. *Atascadero*, 483 U.S. at 247. The following case involves abrogation under the Fourteenth Amendment, but the clear statement test is identical for waiver under the Spending Clause.

In *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), this Court reviewed the following language to determine if it provided a clear statement of Congress' intent to waive Eleventh Amendment immunity:

> (2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and **any party aggrieved** by the findings and decision under subsection (c), shall have the right **to bring a civil action** with respect to the complaint presented pursuant to this section, which action **may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.** In any action brought under this paragraph the court shall receive the records of the administrative

> proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. [Emphasis supplied.]

Act of Nov. 29, 1975, Pub. L. 94-142, § 1, 89 Stat. 773 [42 U.S.C. § 1415 (d)(2), repealed].

The *Dellmuth* Court held that the above language was insufficient to waive Eleventh Amendment immunity. After first rejecting the lower court's holding that intent to waive Eleventh Amendment immunity could be found in the legislative history of an act of Congress, the Court stated:

> Finally, 20 U.S.C. § 1415(e)(2), the centerpiece of the Court of Appeals' textual analysis, provides judicial review for aggrieved parties, but in no way intimates that the States' sovereign immunity is abrogated. As we made plain in *Atascadero*: "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

Dellmuth, 491 U.S. at 231.

This language, the highlighted portions of which are word-for-word identical to the language at issue in this case, was specifically rejected by this Court on the grounds that it is not the clear statement necessary to waive a state's Eleventh Amendment immunity. Section 102 of the Rehabilitation Act is precisely the kind of "general authorization for suit in federal court" that this Court rejected as being insufficient to waive Eleventh Amendment immunity. *Id.* There is no indication that this Court has changed its opinion on this point, since *Dellmuth* is still cited by the Court as one of the principle sources of the clear statement test. *Kimel*, 528 U.S. at 73. This law does not provide a clear statement of intent to waive Eleventh Amendment immunity, and the District Court properly dismissed this suit.

IV. THE "STRUCTURE" OF THE REHABILITATION ACT DOES NOT PROVIDE A CLEAR STATEMENT OF INTENT TO WAIVE ELEVENTH AMENDMENT IMMUNITY.

Ms. Hurst attempts to find a clear statement of the intent of Congress to require the States to waive Eleventh Amendment immunity in the overall "structure" of the Rehabilitation Act. This approach is belied by the way in which the appeals provision was added to the Act in the first place. Prior to the 1998 amendment of the Act, there was no appeal provision at all, and, as noted above, several courts had so held. When the provision granting appeal was added, it took the form of a single subsection allowing "a civil action for review of such decision * * * in any State court of competent jurisdiction or in a district court of the United States." 29 U.S.C. § 722(c)(5)(J)(i).

This section of the Rehabilitation Act clearly does not constitute a comprehensive structure for handling appeals such as that contained in the Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.* The cases she cites, *AT&T Comm. v. Bellsouth Telecom.*, 238 F.3d 636 (5th Cir. 2001) and *MCI Telecom. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir.

2000), dealt with the Telecommunications Act of 1996 and a waiver of Eleventh Amendment immunity under the Commerce Clause rather than the Spending Clause. Both are found in Article I of the U.S. Constitution, and the requirements for waiver of immunity by the States are similar. There must be a clear statement of intent by the Congress of intent to waive the immunity of the States and there must be a voluntary waiver by the State. Thus, the analysis is similar.

A. The Fact That the State Is the Only Possible Defendant Does Not Make This a Clear Statement of Congressional Intent.

Ms. Hurst asserts that the fact that the State of Texas is the only possible defendant in suits under the Rehabilitation Act creates "unambiguous intent to waive state's immunity from suit. Petition at 9. Yet the Petitioner ignores the only case in this Court that addresses a similar statute, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In that case, this Court considered whether the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*., contained "an unmistakably clear statement of its intent to abrogate." *Id.* at 56. That Act provides authority for States to negotiate agreements with Indian tribes for the conduct of gambling operations on Indian lands. The only parties to the agreements are the States and the tribes. The only defendants for the tribes to sue are the States. The decision described the detailed statutory scheme that provided for appeal to the federal courts:

> Section 2710(d)(7)(A)(i) vests jurisdiction in "[t]he United States district courts ... over any cause of action ... arising from the failure of a State to enter into negotiations ... or to conduct such negotiations in good faith." Any

> conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon the State ..."; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith ..., the court shall order the State ..."; § 2710(d)(7)(B)(iv) provides that "the State shall ... submit to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.

Id. at 56-57. By contrast, the single mention of an appeal to federal district court in 29 U.S.C. § 722(c)(5)(J)(i) does not provide the type of clear statement that this Court has consistently required for a knowing waiver of a State's immunity. The provision also purports to allow appeal to state courts. It does not deal with burden of proof. It does not discuss mediation. In sum, there is only the kind of general authorization for suit in federal court rejected in *Dellmuth*.

Somewhere between *Seminole Tribe* and *Murphy*, there is a point below which a statement is no longer clear enough to support a waiver of Eleventh Amendment immunity. In this case, it is evident that Title I of the Rehabilitation Act is well on the side where the statement is not clear enough to provide notice to the States that they will waive their Eleventh Amendment immunity by accepting federal funds.

B. This Court Has Not Adopted the Notion of a "Non-verbal Voluntary Waiver" of Eleventh Amendment Immunity, Nor Should It.

Petitioner relies on the analysis of the Circuit Courts in the *AT&T* and *MCI* cases for the idea that something less than a clear statement of the intent of Congress to condition the receipt of federal funds on a waiver of Eleventh Amendment immunity is required. Yet, this proposition has not been adopted by this Court. The Court specifically declined to decide the issue in another Telecommunications Act case:

> "Whether the Commission waived its immunity is another question we need not decide, because-as the same parties also argue-even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)."

Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 645 (2002).

Ms. Hurst asks the Court to decide a constitutional issue that the Court has specifically declined to decide in a case of far greater implications for the public than the narrow issue involved in this case. She has not provided a compelling reason for granting the review of this case.

C. Ms. Hurst's Position Would Reintroduce A Subjective Standard for Interpretation of Eleventh Amendment Immunity.

While claiming that the language of the Rehabilitation Act provides a clear statement of Congress' intent to waive Eleventh Amendment immunity, Ms. Hurst cannot resist resort to the subjective standard that her position would impose on the states:

> In fact, the Respondents/Defendants obviously recognized this clarity because after the Act was amended in 1998 to add the judicial review provision at issue here, the agency amended its own regulations to provide for judicial review in federal court.

Petition at 8. Ms. Hurst does not make to this Court the argument rejected by the Court of Appeals that DARS waived its immunity through its actions, rather choosing to bring it forth as proof of the clarity of the language of the Act. Unfortunately, the effect is the opposite of what is intended. It merely illustrates that the effect of adoption of Ms. Hurst's position would lead this Court back in the direction of a subjective standard for waiver of immunity thoroughly rejected in *College Savings Bank v. Florida Prepaid Post Secondary Ed. Ex. Bd.*, 577 U.S. 680 (1999).

V. CONCLUSION

The Court should deny the petition for writ of certiorari.

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No. 06-1720

IN THE SUPREME COURT OF THE UNITED STATES

LOUISE ELIZABETH HURST,
Petitioner
v.
TEXAS DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES, *ET AL*
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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Ms. Hurst files this reply to clarify matters that DARS' arguments confuse. This Court should grant certiorari because this case raises an important question of federal law that has not been, but should be, clarified by this Court. Supreme Court Rule 10(c). DARS' Response at 4-5.

I. TITLE I OF THE REHABILITATION ACT CLEARLY SUBJECTS STATES TO SUIT.

Congress may overcome Eleventh Amendment immunity "in statutory text that clearly subjects States to suit ... though without explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). DARS' Response at 7. This is exactly what Congress has done in Title I of the Rehabilitation Act, 29 USC Section 701 - 751.

A. This Statute Is *Not* A General Authorization For Suit.

The provision at issue here, 29 USC 722 is *not* "precisely the kind of 'general authorization for suit in federal court' that this Court rejected as being insufficient to waive Eleventh Amendment immunity." DARS' Response at 11 – 12. In its argument, DARS relies on *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989), which in turn relies on *Atascadero v. Scanlon*, 473 U.S. 235, 246 (1985). But, the Rehabilitation Act differs very significantly from the statutes at issue in *Atascadero* and *Dellmuth*. *Atascadero* itself reasons that Section 505 of the Rehabilitation Act

> provides remedies for violations of [Section 504 of the Rehabilitation Act] by '*any* recipient of Federal assistance.'... [G]iven their constitutional role, the States are not like any other class of recipients of federal aid. A

> general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

Atascadero, 473 U.S. at 245 – 246 (emphasis added by the Court).

B. The Rehabilitation Act Makes Numerous References to the State.

Thus, the statute discussed in *Atascadero* differs from the statute at issue here for two important reasons. First, the *Atascadero* statute does not even mention States.

In contrast, the statute at issue in this case makes "numerous references to 'State'" which make Congressional intent "indubitable." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 57 (1996). The text of Title I as a whole contains 551 references to "State" including 87 references to "designated State unit" and fifty references to "designated State agency." 29 USC 701 – 751. It sets out detailed requirements for state rehabilitation plans, including requirements for administrative mediation, administrative hearings, judicial review, and burden of proof, and conditions receipt of funding on compliance with those conditions. Specifically, the text of 29 USC 722 contains 62 references to "State" including thirty references to "designated State unit" and seven references to "designated State agency." 29 USC 722. More specifically, 29 USC 722(c)(5), entitled "Hearings" and being the portion of the Act of which the judicial review provision at issue here is a subsection, contains 20 references to "State" including seven references to "designated State unit" and two references to "designated State agency." 29 USC 722(c)(5); *see* DARS' Response at 13-14.[1]

C. The Rehabilitation Act Is Unambiguous Because It Authorizes Suit Only Against A State.

Second, and importantly, unlike the statutes in *Atascadero* and *Dellmuth*, the statute at issue here *only* addresses States. Congress directed federal funds specifically and only to States, and did not allow any other local or private entity to accept these funds. In this way, the Rehabilitation Act is fundamentally different from the statutes at issue in *Dellmuth* and *Atascadero.* The statute in *Atascadero* attempts to permit suit against "*any* recipient of Federal assistance." *Atascadero*, 473 U.S. at 245 (emphasis added by the Court). And in *Dellmuth* "the States *along with local agencies* [were] logical defendants." *Dellmuth*, 491 U.S. at 232 (emphasis added). Thus, the judicial review provisions of the *Atascadero* and *Dellmuth* statutes are at best ambiguous because many entities could be subject to suit. In this case, however, State entities are the *only* possible defendants in a suit pursuant to 29 USC 722(c)(5)(J), because Congress permits only States to accept these funds.

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[1] Of course, Eleventh Amendment analysis is "not guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law...." *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 18 (1980). The DARS comparison to the Indian Gaming Regulatory Act is thus misleading because DARS references only one subsection of the Rehabilitation Act (i.e. 29 U.S.C. Section 722(c)(5)(J)(i)) rather than numerous provisions as the Court evaluated in *Seminole Tribe*, 517 U.S. at 56 - 57.

II. LIKE THE TELECOMMUNICATIONS ACT, TITLE I OF THE REHABILITATION ACT CLEARLY AND UNAMBIGUOUSLY SUBJECTS STATES TO SUIT.

DARS' attempts to distinguish the case at bar from *AT&T Comm. v. Bellsouth Telecomm.*, 238 F.3d 636 (5th Cir. 2001), and *MCI Telecoms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000) by arguing that the Telecommunications Act of 1996 deals with "waiver of Eleventh Amendment immunity under the Commerce Clause rather than the Spending clause" at issue here. But, DARS states that the "analysis is similar" under both clauses and that in both contexts there "must be a clear statement of intent" to find waiver. Response at 12 – 13.

"Clear statement" analysis ought to be the same whether Congress enacts a statute using its Commerce Clause or Spending Clause authority. Adopting DARS view that the analysis is "similar," rather than the same, creates uncertainty and confusion around how the two are dissimilar. Indeed, "this Court has recognized that the standard for what is a 'clear statement' test applied to Congressional enactments is the same for both" abrogation in Eleventh Amendment immunity under the Fourteenth Amendment and waiver through the Spending Clause. DARS' Response at 10 (citing *Atascadero*, 473 U.S. at 247). Providing the same standard for "clear statements" in the preemption context and in Spending Clause legislation would further clarify the analysis to be applied to determine whether a statute requires waiver of Eleventh Amendment immunity. Here, since Congress directs Rehabilitation Act funds to States - and only States - the Act's judicial review provision is unambiguous. When a State accepts the funds, it is clearly on notice that it is subject to suit in federal court. 29 USC Section 722(c)(5)(J).

In addition, DARS notes that this Court did not decide whether the State waived its Eleventh Amendment immunity in *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland,* 535 U.S. 635 (2002). Response at 15 – 16. *Verizon* clearly reserves this Eleventh Amendment waiver issue for another case and another day. The day has come when the Court should examine the issue directly and Ms. Hurst's Petition presents the issue.

III. PETITIONER MS. HURST DOES NOT ADVOCATE "SOMETHING LESS THAN A CLEAR STATEMENT."

Moreover, Ms. Hurst does not contend that "something less than a clear statement" is required to condition federal funding on waiver of Eleventh Amendment immunity. DARS' Response at 15. Nor would adoption of Ms. Hurst's position reintroduce a "subjective standard" for determining whether a statute contains a clear statement of intent to condition receipt of federal funding on waiver of Eleventh Amendment immunity. DARS' Response at 16. Rather, this case presents the precise situation of a statute that unambiguously conditions a State's acceptance of federal funding on waiver of Eleventh Amendment immunity without mentioning words such as "Eleventh Amendment," "waiver," or "immunity." Acknowledging this fact would clarify rather than confuse this Court's Eleventh Amendment jurisprudence and would certainly not introduce a "subjective standard" to the "clear statement" analysis.

DARS also relies on several decisions that do not support its position. *See* Response at 4. First, unlike the Rehabilitation Act, the statute at issue in *Pennhurst,* 451 U.S.

at 19, "does no more than express a congressional preference.... and, as such, is too thin a reed to support ... rights and obligations." To the contrary, the Rehabilitation Act explicitly creates "rights and obligations." Without elucidating each statutory reference, the Rehabilitation Act sets out criteria for eligibility, and states that a "designated State unit *shall* complete the assessment for determining eligibility...." Section 722(a)(emphasis added). Furthermore, the "designated State unit *shall* complete the assessment for determining eligibility... and *shall* provide ... information ... including ... a description of the full range of components that *shall* be included in an individualized plan for employment." Section 722(b)(emphasis added).[2]

IV. CONCLUSION.

Petitioner Hurst respectfully asks this Court to grant her petition for a writ of *certiorari* and to reverse the decision of the lower court.

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[2] *United States v. Bass*, 404 U.S. 336 (1971) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) do not support DARS' analysis. *See* Response at 4. First, although both decisions discuss the relationship between the United States and States, neither case addresses the Eleventh Amendment. *Bass* gives a narrow meaning to an ambiguous criminal statute to ensure a "'fair warning of ... what the law intends to do if a certain line is passed,'" and because of the "'instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348. *Rice* addresses the scope of the United States Warehouse Act.

Moreover, both cases resort to legislative history to interpret statutes. *Rice*, 331 U.S. at 244 - 247; *Bass*, 404 U.S. at 341 - 347. By contrast, the terms and structure of Title I of the Rehabilitation Act by themselves clearly subject States to suit upon acceptance of federal funds. No resort to legislative history is required. *Dellmuth*, 491 U.S. at 230 (rejecting use of legislative history as "irrelevant" and "unnecessary").

Respectfully submitted,

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